Supreme Court, U.S.
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No. 90-1693

In The

Supreme Court of the United States

October Term, 1990

CAROL A. BROWN, M.D.,

Petitioner,

v.

DONALD WONG; CLYDE VIERRA; FRANKLIN Y.K. SUNN; EARL MOTOOKA; STATE OF HAWAII; DEPARTMENT OF HUMAN SERVICES, FORMERLY THE DEPARTMENT OF SOCIAL SERVICES AND HOUSING OF THE STATE OF HAWAII,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Hawāii Supreme Court decision denying a Medicaid provider's tort and civil rights claims against the State and individuals on summary judgment motion conflicts with federal appellate decisions creating enforceable private causes of action under the Medicaid and Civil Rights Acts.

2. Whether the Hawaii Supreme Court decision denying a Medicaid provider's tort and civil rights claims conflicts with federal appellate decisions requiring the states to follow the federal Medicaid regulations.

3. Whether the Hawaii Supreme Court opinion granting summary judgment to the State on the basis of a judicial decision intervening cause conflicts with *Malley vs. Briggs*, 475 U.S. 335 (1986), and *Howlett vs. Rose*, 110 S.Ct. 2430 (1990).

4. Whether the Hawaii Supreme Court opinion violates the Petitioner's due process and equal protection rights by granting summary judgment against her while discovery proceedings were stayed by the trial court.

ADDITIONAL RESPONDENT PARTIES

John Does 1 through 10; Doe Corporations 1 through 10; and Doe Unincorporated Associations, including Partnerships 1 through 10, as permitted under civil practice in the State of Hawaii court system.

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HAWAII SUPREME COURT OPINION

The unpublished memorandum opinion *Brown vs. Donald Wong, et al.* appears in Appendix Pages 1a through 2a.

SUPREME COURT JURISDICTION

The Hawaii Supreme Court opinion was entered on February 14, 1991. No motion for rehearing was made. This Court has jurisdiction to review that judgment by writ of certiorari under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS

1. Article I, Section 10 of the United States Constitution (See Appendix 30a).

2. Fourth Amendment to the United States Constitution (See Appendix 31a).

3. Sixth Amendment to the United States Constitution (See Appendix 31a).

4. Fourteenth Amendment due process clause, United States Constitution (See Appendix 31a).

5. 42 U.S.C. § 1396a(a)(1), (3), (5), (7), (41) (See Appendix 32a).

6. 42 U.S.C. § 1983 (See Appendix 34a).

7. 42 U.S.C. § 1985(2) (See Appendix 34a).

8. 42 U.S.C. § 1988 excerpt (See Appendix 36a)

9. 42 U.S.C. § 2000d (See Appendix 37a).

10. 42 C.F.R. § 455.12-16 and § 455.21 (See Appendix 38a).

11. Hawaii Administrative Rules §§ 17-747-12 through -15 (See Appendix 42a).

12. Hawaii Administrative Rules §§ 17-748-1 through -12 (See Appendix 46a).

13. Hawaii Administrative Rules § 17-749-11 (See Appendix 60a).

14. Hawaii Revised Statutes, § 91-3 and -4 (See Appendix 61a).

15. Hawaii Revised Statutes, § 662-1 through 16 (See Appendix 65a).

STATEMENT OF THE CASE

Petitioner sued Respondents in the First Circuit Court of the State of Hawaii on July 29, 1988, alleging in her complaint six theories of recovery, summarized as follows:

> Count I alleges a claim for infliction of emotional distress, seeking special, general, and punitive damages by reason of the malicious and outrageous conduct of Respondents in violating the federal and state regulations when Respondents contacted over 100 of her patients and obtained information from 13 of her sickest patients whose testimony was used by the State to prosecute her for Medicaid fraud based upon vague and ambiguous regulations purportedly defining "psychotherapy" and by claiming that the health care providers' manual constituted a

valid rule in the Medicaid program. Count I also alleges deprivation of due process and equal protection rights guaranteed through the Fourteenth Amendment and right to counsel and right to trial guaranteed by the Sixth Amendment.

Count II alleged a claim for breach of contracts between the DHS (State Department of Human Services, formerly Department of Social Services and Housing, (DSSH),) and a contract between the State of Hawaii and the United States concerning administration of the federally funded medical assistance program known as Medicaid. The breach of contract claim is not before this Court, as it remains in the trial court level in First Circuit Court.

Count III alleges a claim for negligent administration of the Medicaid program by Respondents, generally described as failing to comply with the federal and state regulations, failing to comply with the Medicaid providers' manual, investigation, notification, and legal action requirements, and by adopting vague and ambiguous regulations through HMSA, not a state agency in violation of state statutes, plus failing to adopt a psychiatric providers' manual.

Count IV alleges a claim for invasion of privacy as per the acts alleged in Counts I and III, all of which unreasonably intruded upon the Plaintiff's privacy by harassing her, her patients and medical personnel, and unreasonably subjecting her professional life to publicity, plus placing her in a false light in the public eye.

Count V alleges a tortious interference with contracts, but that claim was not pressed on the appeal.

Count VI alleges a civil rights violation of 42 U.S.C. § 1983, by invasion of Petitioner's

> constitutional rights secured by the United States Constitution, laws, and invaded the physician-patient privilege, violated the contract clause of Article I, § 10 of the United States Constitution and the federal Medicaid regulations. Petitioner also sought reasonable attorney's fees as per 42 U.S.C. § 1988.
>
> The full text of the complaint appears in Appendix 82a.

Dr. Brown sought discovery from Respondents by filing a motion to compel discovery on April 27, 1989, because Respondents refused to answer certain interrogatories and produce certain documents. That information was important to the Petitioner for trial preparation. On June 1, 1989, Circuit Court Judge Klein stayed discovery pending receipt of pretrial motions. (See Appendix 25a for discovery stay order.) Once the discovery had been stayed, Respondents moved for judgment on the pleadings or, alternatively, for summary judgment on July 12, 1989. After extensive arguments in support of and in opposition to the motion for summary judgment which included many records outside of the pleadings, Dr. Brown again attempted to obtain depositions of several key witnesses, such as Messrs. Wong, Vierra, Sunn, Motooka, and Mr. Peter Yee, the principal attorney in charge of the State Medicaid Fraud Unit. Again, petitioner was prevented from obtaining discovery when the trial court issued its protective order on February 22, 1990, preventing Petitioner from deposing said witnesses.

While the discovery was stayed, Judge Klein filed his order on March 7, 1990, granting in part and denying in part the Respondents' motion for summary judgment, dismissing all claims against Messrs. Wong, Vierra, Sunn,

and Motooka, and dismissing all claims with the exception of the contract claim, Count II, against the Respondents State and DHS. (See Appendix 3a for the March 7, 1990, order dismissing all claims except the contract claim.) In dismissing Petitioner's civil rights and tort claims as a matter of law, the trial court held Respondents had "absolute derivative" and sovereign immunity and the State had no duty to properly administer the Medicaid program in Hawaii by following the pertinent federal and state laws, rules, and regulations.

Petitioner appealed from that decision after it was certified as a final order under Hawaii Rules of Civil Procedure (HRCP) Rule 54(b).

In the Hawaii Supreme Court, in the Opening and Reply Briefs, Petitioner raised the constitutional and federal questions about the federal appellate decisions creating enforceable private causes of action under the Medicaid and Civil Rights Acts, the federal appellate decisions requiring the states to follow the federal medicaid rules and regulations, the fact that *Bullen vs. Derego*, 68 Haw. 587, 724 P.2d 108, (1986), conflicts with the U. S. Supreme Court opinion of *Malley vs. Briggs*, 475 U.S. 335, (1986). Petitioner also raised in her Hawaii Supreme Court brief that her due process and equal protection rights were violated by granting summary judgment against her while discovery proceedings were stayed by the trial court. That same issue was litigated in the trial court when she sought discovery on April 27, 1989, by a motion to compel the discovery in the trial court since she needed discovery under all claims including the § 1983 claims. Petitioner also opposed the protective order in the

trial court on January 22, 1990, citing *Makanui vs. Department of Education*, 6 H.A. 397, 721 P.2d 165 (1986), through her opposition to the motion for summary judgment filed August 31, 1989.

The constitutional and federal questions were raised in the Opening Brief before the Hawaii Supreme Court on July 20, 1990. (See Appendix 113a for excerpt of Opening Brief in the Hawaii Supreme Court.)

The trial court's order of March 7, 1990, dismissing all the tort and civil rights claims was affirmed by the Hawaii Supreme Court in its Memorandum Opinion filed February 14, 1991. (See Appendix 1a for the Memo Opinion.) That opinion, in affirming the trial court, decided the federal questions adversely to Petitioner, all of which were raised in Petitioner's Opening and Reply Briefs filed July 20, 1990, and September 27, 1990, respectively.

At the hearing on the motion for summary judgment, the following pertinent facts were developed from the pleadings, the affidavits and exhibits submitted therewith. Dr. Brown became a Medicaid provider in Hawaii on July 27, 1978, in exchange for which, the State agreed to furnish her with financial assistance in caring for the indigent eligible patients. In May of 1978, the State Attorney General's office entered into an agreement with the DSSH in which DSSH agreed to conduct a preliminary investigation of suspected cases of Medicaid fraud by providers and would refer to the Attorney General's office such cases where the investigation indicates the potential for fraud or abuse of a criminal nature. (See Appendix 73a for the agreement.)

As per 42 C.F.R. § 455.13 through § 455.21, the state Medicaid plan must have methods for identifying suspected fraud cases and investigating those cases which do not infringe on the legal rights of the persons involved and yet afford due process of law through procedures developed in the State for referring suspected fraud cases to law enforcement officials. In connection therewith, DHS "must conduct a preliminary investigation to determine whether there is sufficient basis to warrant a full investigation". 42 C.F.R. § 455.14. (See Appendix 38a.)

If the preliminary investigation by the DHS causes reason to believe fraud or abuse has occurred in the program, DHS must refer the case to the Fraud Control Unit for a full investigation of the provider. 42 C.F.R. § 455.15. If the case is to be resolved between DHS and the provider, provider is sent a warning letter, suspended, or recovery of the overpayment to the provider is sought, or other sanctions imposed under the state plan. 42 C.F.R. § 455.16.

On September 17, 1986, Dr. Brown was indicted on 134 counts of Medicaid fraud. Six days later, Mr. Canlas, a local attorney, contacted her by phone advising her that he had discussed her case with Mr. Donald Wong, the chief investigator from the Medicaid Fraud Control Unit (MFCU), and Mr. Wong told him to contact her concerning legal representation. At that time, Dr. Brown had already retained Mr. Michael Weight but anyway agreed to meet with Mr. Canlas. At that meeting, Mr. Canlas told her he was a good friend of Mr. George Yamamoto, the former head of the MFCU, Donald Wong, and other investigators, and that he had handled several Medicaid cases. Mr. Canlas recommended that she should enter a

plea rather than go to trial because it would be too hard to get acquitted on 134 counts. Mr. Canlas suggested Dr. Brown terminate her present counsel and retain him with $15,000.00. Dr. Brown met with Mr. Canlas on two other occasions in which he brought a tape recording of one of Dr. Brown's patients who the prosecution was going to use to testify against Dr. Brown. He also had a recording of Mr. Yamamoto discussing with him the pros and cons of her case and further advising that Mr. Yamamoto could help. It's noteworthy at this point that Mr. Yamamoto was the named Defendant in the case of *Lane vs. Yamamoto,* 2 H.A. 176, 628 P.2d 634 (1981). Mr. Canlas told her that the whole thing was political and that she should see Mr. Waihee, now Governor of the State of Hawaii. Mr. Canlas further suggested that she could get off the hook if she would just admit to one count of theft and pay $2,000.00. Dr. Brown told him she was not guilty and would proceed to go to trial on the case. Mr. Canlas and Mr. Yamamoto are now practicing law together in the same office in Honolulu. Dr. Brown's affidavit established that Mr. Canlas had done this similar routine for other Medicaid providers charged with Medicaid fraud.

Dr. Brown's affidavit establishes that three female psychologists or psychiatrists have been prosecuted for such crimes since 1983 without any admininstrative hearings concerning their alleged overcharges in the program, and another female physician was prosecuted for Medicaid fraud. Moreover, in the prior six years, more providers in the field of psychology and psychiatry have been prosecuted for Medicaid fraud than any other branch of providers; therefore, she needs additional discovery to resolve these factual issues.

Dr. Brown was never given any notice by DSSH that she was suspected of any overpayment. If she had been, she would have been entitled to an administrative hearing under HAR § 17-748-3 because the administrative decision would have been an act "in a manner disagreeable to the provider relating to level of care, medical necessity, medical appropriateness, or on claims for service".

According to the testimony of Earle Motooka, the Medicaid providers' manual used against Petitioner in the criminal trial defining "psychiatric outpatient service" as a personal contact between the patient and the psychiatrist was never promulgated as an administrative procedure rule.

HAR § 17-749-11 defines "individual psychotherapy" as "an interaction between two parties, the therapist and the patient. The term encompasses a wide variety of therapies that differ in intensity and duration". (See Appendix 60a.)

This definition is so illusory in the present practice of psychiatry that it is meaningless because often times extremely mentally ill patients cannot even interact with the psychiatrist and require medication plus obtaining information from other sources in an effort to treat the mentally ill patient. Consequently, the definition is meaningless and only permitted the State to falsely accuse psychiatrists of overbilling the state program. See Dr. Wallace Chun testimony excerpt, Appendix 98a.

The State indicted and tried their Medicaid fraud case against Dr. Brown using some of her sickest psychiatric patients as fact witnesses against her. Those patients

were really not psychiatrically competent witnesses to testify about the amount of time they spent in therapy because their disorders warped their time perception by reason of prior or current drug use or other abnormal syndromes. Mr. Wong's grand jury testimony about what two patients would have said if they had been before the grand jury was completely contrary to their later testimony and actual facts.

The prosecution of Dr. Brown in state court was highly publicized in the newspaper and on television, placing her in a fa'se light in the public eye and causing people to avoid her and think less of her as a physician. This notoriety was highly offensive and invaded her privacy, causing her extreme emotional and mental distress and physical injury of a thyroid disfunction and tumor from the chemical imbalance in her body.

Dr. Brown was acquitted of all 134 charges of Medicaid fraud and established at trial that she spent more than 45 minutes of therapy time treating those patients on each item billed.

Dr. Brown's house and office were searched for records, and patient records were seized. She was investigated before indictment by the MFCU and was never advised of any complaint as required by the state and federal regulations. She was never given any administrative hearing on the referral of the case to the MFCU. The regulations are so broad as to permit criminal prosecution against psychiatrists, in that they do not say that all the time in service must be actually face-to-face with the patient for the full 50 minutes. Nevertheless, she was investigated and prosecuted on that assumption. The

reality of the situation is that, depending on the severity of the patient's illness, less time is spent personally with the sicker patients than the not-so-ill, because the really sick patients cannot assist in furnishing accurate information for treatment; however, the overall time spent is the same or greater.

Based on the foregoing, Judge Klein refused to lift the discovery stay orders and ruled that Petitioner had no civil rights and tort claims against the Respondents. The Hawaii Supreme Court agreed without a detailed opinion. Petitioner asserts otherwise and that these substantial federal questions conflict with federal appellate decisions and decisions of this Court.

ARGUMENT

I. The Hawaii Supreme Court decision on a federal question conflicts with applicable decisions of this Court.

Wilder vs. Virginia Hospital Association, ___ U.S. ___, 110 S.Ct. 2510 (1990), holds, *inter alia*, that the Medicaid Act creates both procedural and substantive rights enforceable by health care providers under 42 U.S.C. § 1983. Moreover, that Act is binding upon the states. The Hawaii Supreme Court opinion affirming the trial court's decision denying her civil rights claim and tort claims against Respondents clearly conflicts with the *Wilder* doctrine. This conclusion is reinforced by *Howlett vs. Rose*, ___ U.S. ___, 110 S.Ct. 2430 (1990), holding the county school board and three school officials may be subject to liability

under 42 U.S.C. § 1983 and a state law sovereign immunity defense is not available to the school board in the § 1983 action brought in state court.

The Hawaii Supreme Court opinion conflicts with *Westfall vs. Erwin*, 484 U.S. 292 (1988), holding that federal officials have no absolute immunity from state claims unless the conduct complained of was within the scope of their duties and was discretionary. Here, there was no discretionary function because the state officials must follow the federal and state regulations as standards in administering the federally funded and locally administered program. *Harris vs. McRae*, 448 U.S. 297 (1980), and *Silver vs. Baggiano*, 804 F.2d 1211 (11th Cir., 1986). Thus, the state employees have no discretion in violating a federal statute, regulation, or policy in administering the federal program. *Berkovitz vs. United States*, 486 U.S. 531 (1988).

It should be no surprise to the Hawaii courts that providers have standing to assert their rights under the rules and regulations of the Medicaid program. *Maine vs. Thiboutot*, 448 U.S. 1 (1980), and *Singleton vs. Wulff*, 428 U.S. 106 (1976).

The Hawaii Supreme Court affirmance of the Circuit Court opinion relying on *Will vs. Michigan Department of State Police*, 491 U.S. 58 (1989), is not well taken considering *Jett vs. Dallas Independent School District*, 491 U.S. 701, 109 S.Ct. 2702 (1989), holding that an action under § 1983 for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws is the exclusive federal damages remedy for violation of rights guaranteed under § 1981 when the claim is against a state

actor. Here, the civil rights claims are against the named individuals Messrs. Wong, Vierra, Sunn, and Motooka, so the Hawaii Supreme Court opinion clearly conflicts with the foregoing opinions on a federal question. Accordingly, certiorari must be granted in this case to correct such error.

Where government investigators conspire with another to violate the plaintiff's civil rights, "no court has yet held that absolute immunity from prosecution for false testimony extends to conspiracy with public officials to present false testimony". *San Felipo vs. U. S. Trust Company of New York*, 737 F.2d 246 (2nd Cir., 1984), cert. den., 470 U.S. 1035 (1985). Here, Petitioner alleged a conspiracy between Mr. Canlas and Respondents Wong and Vierra to violate Plaintiff's Sixth Amendment right to trial and counsel and to deny her equal protection of the laws, all in violation of 42 U.S.C. § 1985(2). Instead of permitting Petitioner to develop this factual issue, Petitioner was prevented from obtaining depositions and other discovery while the motion for summary judgment was pending in the trial court. This, likewise, denied her equal protection of the laws and due process in violation of the Fourteenth Amendment to the United States Constitution. See the related argument *infra* in part IV of this argument.

According to *Melo vs. Haffer*, 912 F.2d 628 (3rd Cir., 1990), cert. granted, 111 S.Ct. 1070 (Feb. 25, 1991), an individual state official, when sued in his or her personal capacity only acting under color of state law, was erroneously dismissed under *Will vs. Michigan Department of State Police, supra*, because the personal capacity suits against the individual state officials are not against the

State. Even where a private person racially discriminates based upon a state-enforced custom, that private person will be subject to civil rights liability under § 1983. *Adickes vs. S. H. Kress and Company*, 398 U.S. 144 (1970).

The Hawaii appellate courts have recognized such rights and claims as demonstrated by *Wilder vs. Tanouye*, 7 H.A. ___, 782 P.2d 347 (1988), holding that prison officials are subject to civil rights liability where genuine issues of material fact exist precluding summary judgment. Here, Petitioner alleged numerous violations of her civil rights guaranteed by the United States Constitution and Medicaid regulations and laws adopted pursuant to federal statutes. It was, therefore, clearly erroneous for the trial court and the Hawaii Supreme Court to conclude otherwise on a motion for summary judgment because Petitioner had alleged and was attempting to prove that the individual Respondents had acted with deliberate indifference to her civil rights. *City of Canton, Ohio vs. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989). Even a single decision may subject a civil defendant to liability under 42 U.S.C. § 1983 where there has been "a deliberate choice to follow a course of action is made from various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question". *Pembaur vs. City of Cincinnati*, 475 U.S. 469, 483-484 (1986).

When the Hawaii Supreme Court affirmed the trial court's decision that the individual defendants had absolute immunity, this decision conflicts with *Howlett vs. Rose, supra*, and *Westfall vs. Erwin, supra*. See also *Fujiwara vs. Clark*, 703 F.2d 357 (9th Cir., 1983), holding that two officers of the Hawaii Department of Education did *not enjoy* qualified immunity from liability in connection with

discharging a plaintiff employee and were, therefore, liable under 42 U.S.C. § 1983 for damages for deprivation of free speech.

When a state official violates federal law, he is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct". *Demery vs. Kupperman*, 735 F.2d 1139 (9th Cir., 1984), citing *Scheuer vs. Rhodes*, 416 U.S. 232 (1974). See also *Keaukaha-Panaewa Community vs. Hawaiian Homes*, 739 F.2d 1467, 1470 (9th Cir., 1984), which holds that the Hawaiian Admission Act of 1921 creates federal rights enforceable under a § 1983 action regardless of whether any such private action is defined in the Admission Act because there is a "presumption that a federal statute creating enforceable rights may be enforced in a § 1983 action".

The Intermediate Court of Appeals in Hawaii has recognized that state officials sued in their personal or individual capacity may be liable for constitutional rights violations as per *Makanui vs. Department of Education*, 6 H.A. 397, 721 P.2d 165 (1986). However, the Hawaii Supreme Court apparently does not so agree.

Thus, the Medicaid providers have become slaves of the Medicaid program without any rights according to the Hawaii Supreme Court. The question then becomes, "What did the State do to violate Petitioner's provider rights?" The answer is as follows:

> A. Investigated and prosecuted her without valid rules and regulations defining what she did was wrong.

B. Violated the federal regulations on investigating and prosecuting her in such a manner that it violated her rights to due process as guaranteed by the federal regulations.

C. Violated the Hawaii Administrative Rules (HAR) § 17-748-3 by failing to notify her and afford her a reasonable hearing regarding the manner in which they were conducting their investigation.

D. Breached the physician-patient confidentiality relationship.

E. Respondents Wong and Vierra violated her Fourth Amendment rights guaranteed through the Fourteenth Amendment due process clause.

F. Respondents Wong and Vierra violated her Sixth Amendment rights guaranteed through the Fourteenth Amendment due process clause when they conspired together with Mr. Canlas to violate Petitioner's Sixth Amendment rights.

G. Respondents sought to impose upon Petitioner a definition of "psychiatric outpatient visit" which was never adopted as a rule according to the Hawaii Administrative Procedure Act contrary to *Burk vs. Sunn*, 705 P.2d 17 (Haw., 1985), and *Linoz vs. Heckler*, 800 F.2d 871 (9th Cir., 1986). See Hawaii Revised Statutes (HRS) § 91-3 and -4 for the Hawaii Administrative Procedures Act which is similar to 5 U.S.C. § 553(b) and (c). Thus, the Respondents violated their own statutes and regulations in seeking to impose the providers' manual definition upon the Petitioner.

H. Respondents attempted to impose rules upon Petitioner by use of supplemental bulletins or newsletters, none of which were adopted

according to HRS § 91-3. Accordingly, those attempted regulations were invalid under the Medicaid providers' rules and regulations and could not be used to evaluate Petitioner's billing practices, in much the same fashion as *Union of American Physicians vs. Kizer*, 272 Cal.Rptr. 886 (Cal. App. 2d Dist, 1990).

I. If the State had not attempted to use such illusory rules and definitions, Petitioner would not have been subjected to a criminal investigation and prosecution, but would have instead been able to challenge that rule and regulation in the administrative process set up by the State in HAR 17-748-3.

All of the foregoing establishes the negligent manner in which the Respondents administered the program in failing to exercise reasonable care to follow the federal and state rules and regulations. Clearly under state law, this constitutes evidence of negligence subjecting the State to liability for such tort claim. *Figueroa vs. State*, 61 Haw. 369, 609 P.2d 1198 (1980). Failure to exercise due care in the performance of their duties as state employees are actionable under the State Tort Liability Act. *Upchurch vs. State*, 51 Haw. 150, 454 P.2d 112 (1969). When a state chooses to participate in the Medicaid program, it *must* comply with the federal requirements of the act. *Harris vs. McRae, supra*. Failure to follow regulations and statutes constitute an operational decision and are not within the discretionary function. *Berkovitz vs. United States, supra*, and *Julius Rothschild and Company vs. State*, 66 Haw. 76, 655 P.2d 877 (1982). Even a discretionary function issue is a factual inquiry precluding summary judgment. *Breed vs. Shaner*, 57 Haw. 656, 562 P.2d 436 (1977).

Here, the regulations clearly require that the state agency conduct a preliminary investigation to determine whether the provider violated the rules and regulations. 42 C.F.R. § 455.14. The regulations also require that the methods for investigating shall not infringe on the legal rights of persons involved, yet afford due process. 42 C.F.R. § 455.13. 42 C.F.R. § 455.12 requires that the state plan follow the requirements of the foregoing.

Where the State negligently inflicts emotional distress upon the Plaintiff, the State is subject to damage liability without even physical impact or manifestation of harm. *Campbell vs. Animal Quarantine Station*, 63 Haw. 557, 632 P.2d 1066 (1981).

According to *State vs. Quelnan*, 70 Haw. 194, 767 P.2d 243 (1989), the State has a duty in prosecuting a case to seek justice, exercise good faith in the interest of the public, and to avoid the appearance of an unfair advantage over the accused. In Hawaii, the State has a duty to design and construct its highways to be reasonably safe for motorists and thereafter maintain them in a reasonably safe condition. *Pickering vs. State*, 57 Haw. 405, 557 P.2d 125 (1976). The State even has a duty to protect its prisoners against unreasonable risk of harm and is liable in negligence for failing to do so. *Haworth vs. State*, 60 Haw. 557, 592 P.2d 820 (1979).

Under these case authorities, clearly the Supreme Court erred in holding that the State has no duty to the providers to administer the Medicaid program according to the federal and state rules and regulations. If the provider must abide by the rules, so must the State. It is simply a matter of following the standards. If the State

fails to do so, the State is liable not only for state law claims but also the individual defendants are civilly liable under 42 U.S.C. § 1983. The Medicaid providers cannot be slaves of the Medicaid program without any civil rights. The Hawaii Supreme Court opinion deprives Petitioner of her civil rights and conflicts with this Court's opinions. Certiorari must be granted to correct this gross injustice, not only for the Petitioner, but for all other Medicaid providers by resolving this important federal question now before the governments further enslave the Medicaid providers without any civil rights in violation of 42 U.S.C. § 1983.

II. The Hawaii Supreme Court opinion violates federal case law requiring states to follow the federal Medicaid regulations.

Again, the Hawaii Supreme Court opinion violated some important decisions of this Court when it affirmed the trial court's decision that "no legal duty was owed by the State or its administrators to Plaintiff to properly administer the Medicaid program". Such decision clearly violates *Harris vs. McRae, supra; Berkovitz vs. U. S., supra;* and *Silver vs. Baggiano, supra.* More recently, this decision violates and conflicts with *Wilder vs. Virginia Hospital Association, supra;* and *Howlett vs. Rose, supra.* The above case authority makes it perfectly clear that once the State agrees to participate in the federally funded program, it *must* comply with the Medicaid Act and regulations promulgated thereunder. The State has no discretion on whether to adhere to the federal regulations. If the State fails to follow such regulations, this constitutes negligence and a breach of duty to follow such regulations and

statutes. Clearly, under *Wilder vs. Virginia Hospital Association, supra,* the Medicaid provider is entitled to enforce that duty, and that enforcement may be obtained in state court regardless of a state law sovereign immunity defense because that would directly violate federal law. *Howlett vs. Rose, supra.*

III. The Hawaii Supreme Court opinion violates *Malley vs. Briggs* and *Howlett vs. Rose.*

The Hawaii Supreme Court opinion affirming the Circuit Court decision that the case of *Bullen vs. Derego,* 68 Haw. 587, 724 P.2d 108 (1986), immunizes the individual defendants from civil rights liability under 42 U.S.C. § 1983 clearly conflicts with this Court's opinion in *Howlett vs. Rose, supra,* as previously argued in argument Part II because the state law sovereign immunity defense is not available in a § 1983 action brought in state court since "the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source".

Moreover, the *Bullen* rationale of breaking the chain of causation was rejected by this Court in *Malley vs. Briggs,* 475 U.S. 335, 344 (1986), in Footnote 7:

> "7. Petitioner has not pressed the argument that in a case like this the officer should not be liable because the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest. It should be clear, however, that the District Court's 'no causation' rationale in this case is inconsistent with our interpretation of § 1983. As we stated in *Monroe vs. Pape,* 365 U.S. 167,

> 187, (1961), § 1983 'should be read against the backdrop of tort liability that makes a man responsible for the natural consequences of his actions.' Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link."

Here, the Hawaii Supreme Court affirmed the dismissal of the tort claims and the civil rights claims on the basis that the Respondents are insulated from liability for damages to the Plaintiff because the chain of causation was broken by the independent judgment of the Circuit Court Judges Milks and Watanabe in denying Petitioner's motions to dismiss and suppress during the criminal trial in which Dr. Brown was charged with Medicaid fraud upon which she was ultimately acquitted of all counts. As argued in the Hawaii Supreme Court, not only does the *Bullen vs. Derego* opinion conflict with *Malley vs. Briggs, supra,* and *Howlett vs. Rose, supra,* but it in effect conflicts with *Smiddy vs. Varney,* 665 F.2d 261 (9th Cir., 1981); the exception language contained in *Aimes vs. United States,* 600 F.2d 183 (8th Cir., 1979); and the strong dissent in *Rodriguez vs. Ritchey,* 556 F.2d 1185 (5th Cir., 1977), in which the dissent argued, on Page 1206:

> "The grand jury does not have the powers of an alchemist, changing the gold of constitutional rights into the brass of constitutional deprivation. Grand juries are charging bodies, but it has never been suggested that they are vested with the ability to discharge a person from violating the Constitution."

The *Bullen* opinion also relied upon *Dellums vs. Powell,* 566 F.2d 167 (D.C. Cir., 1977), which actually affirmed a

jury verdict of liability but remanded for damages determination for a violation of First Amendment rights and vacated judgment against the chief of police for malicious prosecution and remanded for a new trial on the issue of whether he instituted the action or if the attorney general office acted independently to break the chain of causation between the chief of police and the prosecutor. We also know in Hawaii that an indictment obtained by perjury, fraud, or other corrupt means is invalid. *House vs. Ane*, 56 Haw. 383, 538 P.2d 320, (1975).

Again, the Hawaii Supreme Court decision conflicts with opinions of this Court and with circuit court opinions on an important question of federal law which should be settled by this Court in this case.

IV. Petitioner's due process and equal protection rights were violated by preventing discovery proceedings while the trial court entertained a summary judgment motion.

On July 12, 1989, Respondents filed their motion for judgment on the pleadings or, alternatively, for summary judgment. Prior to April 27, 1989, Petitioner had been attempting to obtain discovery and was required to file a motion to compel discovery on April 27, 1989. The trial court entered an order June 1, 1989, staying discovery for 60 days pending receipt of any motions by the Plaintiff or Defendants on the issue of sovereign immunity. Since that order had expired, Petitioner again attempted to obtain depositions of Messrs. Wong, Vierra, Sunn, Motooka, and Deputy Attorney General Peter Yee. Again, on the strength of *Mitchell vs. Forsyth*, 472 U.S. 511 (1985), and *Marx vs. Government of Guam*, 866 F.2d 294 (9th Cir., 1989),

the trial court again stayed discovery, preventing Petitioner from obtaining the depositions of said witnesses.

Since the Petitioner has the burden of establishing malice to defeat any qualified privilege that may exist for the Respondents, a denial of discovery in this proceeding clearly violates due process and equal protection of the laws since the nonmoving party cannot simply sit idly by and rest on the allegations in the complaint to defeat a motion for summary judgment. *Celotex Corp. vs. Catrett*, 477 U.S. 317 (1986). Moreover, the language contained in *Mitchell vs. Forsyth, supra*, used by the trial court and affirmed by the Hawaii Supreme Court does not support termination of discovery prior to determination of the motion for summary judgment. Plaintiff is entitled to her inquiry into the issue of malice to defeat a qualified privilege which may or may not exist depending upon the status of the record at the time of the motion for summary judgment, but certainly to deprive the Plaintiff of her discovery at that time denies her due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. Under these circumstances, it is clearly inappropriate within the procedural posture of this case because there still exists a genuine dispute about the facts so that summary judgment should not have been granted while extensive discovery was pending and sought by the Petitioner. *O'Connor vs. Ortega*, 480 U.S. 709 (1987). In fact, Hawaii case law supports such conclusion. *Makanui vs. Department of Education*, 6 H.A. 397, 721 P.2d 165 (1986). Suppression of favorable material evidence by the State violates due process regardless of any good or bad faith by the State. *State vs. Estrada*, 69 Haw. 204, 738 P.2d 812

(1987). See also *Hoover vs. Halston Valley Community Hospital,* 545 F.Supp. 8 (Ed. Tenn., 1981), as well as *Adickes vs. S. H. Kress and Company, supra,* holding summary judgment inappropriate where further inquiry is necessary to develop the facts in a civil rights case.

CONCLUSION

It is therefore respectfully submitted that the Hawaii Supreme Court decided federal questions contrary to the decisions of the United States Court of Appeals and has decided important questions of federal law which conflict with applicable decisions of this Court and which should be settled by this Court. For each and all of the foregoing reasons, Petitioner requests the Court to issue a writ of certiorari to the Hawaii Supreme Court to review the opinion in this case.

Respectfully submitted,

R. STEVEN GESHELL
Counsel of Record for Petitioner
Carol A. Brown, M.D.

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NO. 14443

IN THE SUPREME COURT OF THE STATE OF HAWAII

CAROL A. BROWN, M.D., Plaintiff-Appellant, vs. DONALD WONG, CLYDE VIERRA, FRANKLIN Y. K. SUNN, EARL MOTOOKA, THE STATE OF HAWAII, DEPARTMENT OF HUMAN SERVICES, formerly the Department of Social Services and Housing of the State of Hawaii, Defendants-Appellees, and JOHN DOES 1 THROUGH 10, DOE CORPORATIONS 1 through 10, and DOE UNINCORPORATED ASSOCIATIONS, INCLUDING PARTNERSHIPS 1 through 10, Defendants.	CIV. NO. 88-2370 APPEAL FROM THE ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, FILED MARCH 7, 1990 FIRST CIRCUIT COURT

MEMORANDUM OPINION

(Filed Feb. 14, 1991)

Plaintiff-Appellant, Carol A. Brown, M.D. (Brown), appeals from the First Circuit Court's grant of summary judgment in favor of Defendants-Appellees, Donald Wong; Clyde Vierra; Franklin Y. K. Sunn; Earl Motooka; State of Hawaii; Department of Human Services; Does 1

thru 10; Doe Corporations 1 thru 10, and Doe Unincorporated Associations, including Partnerships 1 thru 10. Brown's suit alleged negligent and intentional infliction of emotional distress (count I), negligent administration of the Medicaid program (count III), invasion of privacy (count IV), and civil rights violations under 42 U.S.C. § 1983 (count VI). On appeal, Brown does not challenge the grant of summary judgment as to tortious interference of contracts (count V), and the denial of summary judgment as to breach of contract (count II).

Based on a careful review of the record, we hold that the trial court did not commit error.

Affirmed.

DATED: Honolulu, Hawaii, February 14, 1991.

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for plaintiff-appellant.

Steven S. Michaels,
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for defendants-appellees.

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/s/ Yoshimi Hayashi
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CAROL A. BROWN, M.D. Plaintiff, vs. DONALD WONG; CLYDE VIERRA; FRANKLIN Y.K. SUNN; EARL MOTOOKA; THE STATE OF HAWAII; DEPARTMENT OF HUMAN SERVICES, formerly the Department of Social Services and Housing of the State of Hawaii; JOHN DOES 1 through 10; and DOE UNINCORPORATED ASSOCIATIONS, INCLUDING PARTNERSHIPS 1 through 10, Defendants.	Civil No. 88-2370-07 ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT FROM ORAL HEARING Date: September 14, 1989 Time: 10:30 a.m. Judge: Hon Robert G. Klein Trial Week: Continued

ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

This matter came on for hearing on September 14, 1990, at 10:30 a.m. before the Honorable Robert G. Klein, upon Defendants' Motion for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment, filed on July 12, 1989. Representing Defendants Donald Wong, Clyde Vierra, Franklin Y.K. Sunn, Earl Motooka, the State of Hawaii, and the Department of Human Services, State of Hawaii ("Defendants") was Steven S. Michaels, Deputy Attorney General. Appearing on behalf of Plaintiff Carol A. Brown, M.D., was R. Steven Geshell, Esq. Having reviewed the papers presented upon the motion, and the arguments of counsel, and being informed in the premises, the Court, rules as follows:

1. This action arises out of the investigation and subsequent prosecution of Dr. Carol A. Brown upon 134 counts of overbilling the Medicaid program, administered by the State of Hawaii and the United States pursuant to 42 U.S.C. §§ 1396 *et seq.*, in alleged breach of Haw. Rev. Stat. § 346-43.5 (1985). The gravamen of the State's case was that Dr. Brown, a psychiatrist, had fraudulently sought and obtained reimbursement for fifty minute face-to-face sessions with her patients when in fact she allegedly spent considerably less time with her patients. Search warrants, issued upon the *ex parte* application of Defendant Donald Wong, an investigator for the Medicaid Fraud Control Unit of the Department of the Attorney General, State of Hawaii, were executed against Dr. Brown's residence and business office, were executed

in November of 1985. On November 4, 1985, state investigators searched approximately 100 patient records at Dr. Brown's office pursuant to the search warrant issued that day. On November 5, 1985, warrants were obtained to search Dr. Brown's home at 46-318 Haiku Road § 67, in Kaneohe, Hawaii 96744. Following the execution of the search warrant upon Dr. Brown's office, in November, 1985, one of Dr. Brown's employees, Sadie Kobayashi, spoke with Dr. Brown about the matter. Dr. Brown was on full notice of the MFCU investigation at least since November, 1985.[1] In April, 1986, additional patients of Dr. Brown were interviewed, and a grand jury was convened and indicted Dr. Brown on September 17, 1986. *See id.* at 27; *State v. Brown*, Cr. No. 86-1082 (Haw. Cir. Sept. 17, 1986), Exh. "A" to Def. filing of July 12, 1989.

3. In a Motion to Dismiss the Indictment, filed on January 23. 1987, Dr. Brown asserted that, *inter alia*, the indictment was procured by the allegedly perjured testimony of Donald Wong, a "Special Investigator for the Medicaid Fraud Control Unit" who testified at the grand jury proceedings in September 1986. Dr. Brown also argued that, as a general matter, the indictment was based upon "hearsay, innuendo and incomplete evidence," was procured by "misconduct of the prosecutor," and rested upon the testimony of persons whose "competency would be questionable as a witness in a judicial proceeding." Dr. Brown also asserted that the billing

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[1] *See* Tr. of Grand Jury Proceedings at 21-22, *re: State v. Brown*, CR. No. 86-1082 (Haw. Cir. Sept. 17, 1986), Exh. "A" to Motion to Dismiss the Indictment, *State v. Brown*, CR. No. 86-1082 (Haw. Cir. Jan. 23, 1987), reprinted at Exh. "B" to Def. filing of July 12, 1989, *Brown v. Wong*, Civil. No. 88-2370-07.

authorizations which she was alleged to have criminally breached were (1) not promulgated in conformity with the Administrative Procedure Act; (2) were constitutionally void for vagueness; and (3) amounted to an unlawful delegation. *See* Mem. in Suppo. of Motion to Dismiss, *State v. Brown*, CR. No. 86-1082 (Haw. Cir. Jan. 23, 1987), *supra* note 1, at 9, 10, 11, 12-16.

4. The Motion to Dismiss was denied by Circuit Judge Marie N. Milks, after briefing and argument, and oral hearings on February 5, and 19, 1987. In her order, Judge Milks ruled:

> With regard to Defendant's argument that the evidence submitted to the Grand Jury was insufficent to sustain the indictment, the Court finds that in addition to the testimonies of eleven alleged patients of the Defendant, the prosecutor called two employees of the Defendant. The first employee, Sadie Kobayashi, testified that she prepared Medicaid claims for the Defendant and these claims were for fifty (50) minutes sessions. She testified that claims for fifty minute sessions were submitted to the Medicaid Program even though the Defendant saw Patients for fifteen (15) or twenty (20) minutes. When confronted by Ms. Kobayashi regarding this practice, Defendant informed her that the claim was based on time spent with the client over the telephone and reports which had to be completed.
>
> The other employee, Kathryn Buckley, testified that she managed the Defendant's appointment books and that patients were scheduled every thirty (30) minutes. She testified that charges were made in advance of the fifty minute sessions with the Defendant. Upon confronting the Defendant Ms. Buckley was told that the

billings were justified because of time spent on the telephone with other doctors, court appearances, reports, and child custody cases.

The hearsay testimony of two patient witnesses, Ronalda Barrymore and Yvette VanSchoor, was presented through the testimony of Special Investigator Donald Wong of the Attorney General's office. Based upon the totality of the evidence presented through the various patients, the two employees, and Special Investigator Wong, the Court finds that there was sufficient probable cause for the grand jurors to conclude as to each of the counts, 1 through 134, that the Defendant probably committed the alleged offenses.

With regard to the Defendant's claim that the Grand Jury proceedings were defective because there was no independent grand jury counsel who appeared before the grand jury, that claim is without merit since the issue has already been disposed of by way of the Hawaii Supreme Court's decision in *State v. Kahlbaun*, 64 Haw. 197 (1981).

With regard to Defendant's claim that there was no showing that the proposed indictment was read to the Grand Jury, the evidence shows that the Proposed indictments were submitted to the grand jurors in typed forms as to each of the counts, 1 through 134.

Defendant also claims that the grand jurors were not informed what the law was. This claim is also without merit since the function of the grand jury is merely to determine whether the facts were sufficient to square with the proposed indictment.

With regard to the Defendant's argument that witnesses Theodore Hirotsu and Carol Takano could not specify that Defendant had necessarily seen the manual, the Court has heard representations made that certain reports were distributed to the various doctors and the Defendant was thus on notice.

Defendant claims that the Indictment is defective because there is no correlation of the dates alleged in the Indictment with the evidence presented to the Grand Jury. The Court notes that witness John Gesang, who testified regarding Counts 54 through 81, testified on two occasions he did see Defendant for forty-five (45) minutes but said that the dates that he saw her for that time period was approximately December, 1984, through January, 1985. Examining the Indictment, Defendant was not charged with dates inclusive of December 1984, and January, 1985. Witness Addie Farr, Counts 1 through 11, testified that every time she went to the Defendant, the sessions were fifteen (15) to twenty (20) minutes. Ronalda Barrymore's hearsay testimony as to Counts 12 through 38 was that for most sessions they were fifteen to thirty (30) minutes. Yvette VanSchoor also testified to that effect. The rest of the witnesses testified consistently that with regard to all of the sessions with Defendant, all sessions were ten (10) to fifteen minutes in length. Based upon the totality of all the witnesses' testimony, the Court finds that the grand jurors could reasonably infer that it was Defendant's practice to bill in excess of time spent.

With regard to Defendant's argument regarding the credibility of witnesses Van Schoor and Barrymore, those issues are more properly brought to the attention of the trial court or jurors. This Court defers to the fact-

finders to make the determinations as to credibility.

Defendant alleges that the statu[t]es and administrative rules applicable to this case are unconstitutionally vague. Having reviewed the applicable rules and statutes, the Court finds that they are sufficiently clear to fairly place Defendant on notice as to the requirements of the law. Any argument that the statutes and rules are vague or ambiguous is more a matter of trial defense and trial defense strategy and judgment rather than one of constitutional importance.

With regard to the Defendant's arguments pertaining to the Administrative Procedures Act under Chapter 91 of the Hawaii Revised Statutes and all of the administrative-type documents, the Court concurs with the prosecutor's arguments that these are matters of evidence and are not of constitutional dimension. *In re Kauai Electric Div. of Citizens Util. Co.*, 60 Haw. 166 (1978).

Order Denying Motion to Dismiss Indictment, *State v. Brown*, Cr. No. 86-1082 (Haw. Cir. Apr. 1, 1987), Exh. "F" to July 12, 1989, Motion, *Brown v. Wong*, Civ. No. 88-2370-07 (Haw. Cir. 1989).

5. Dr. Brown also moved to suppress items seized pursuant to the search warrants (Nos. 85-279 and 85-280) issued on November 4, 1985, by District Judge Kenneth Saruwatari, and executed by investigator Wong against Dr. Brown's residence and office, on the grounds, *inter alia*, that the search warrants were not backed by probable cause, were overbroad, and violated in other respects the search and seizure provisions of the Hawaii Constitution, Haw. Const. art. I, § 7 (1978). Motion to Suppress at

2, *State v. Brown*, Cr. No. 86-1082 (Haw. Cir. Jan. 23. 1987), Exh. "C" to July 12, 1989, Motion, *Brown v. Wong*, Civ. No. 88-2370-07.

6. Dr. Brown's motion to suppress was also denied by Circuit Judge Milks, after briefing and argument, who stated:

> Defendant argues that there was no evidence in the affidavit showing the reliability of the witnesses upon which the search warrant was issued. Defendant further argues that the reliance on the testimony of mental patients is presumptively prejudicial. The search warrants in this case, however, were based in large measure upon the interview of the employee. The reliability of the foremer [sic] employee cannot be subjected to the same credibility test as with a confidential informant situation since the former employee is a citizen complainant.
>
> Defendant also argues that the scope of the search warrants issued in this case was unduly broad relying on *Monick v. State*, 64 Haw. 399 (1982). Unlike the *Monick* case, the search warrants in this [case] did not authorize a general seizure of all records. Rather, the patients were specified and the patients were known to the officers.
>
> The Court finds that the hearsay presented in support of the search warrants in this case fall outside the scope of the two prongs of *Aquilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969). As mentioned above, the informants in this case are citizen informants and not confidential informants. It is not necessary for this Court to determine whether Hawaii will follow *Illinois v. Gates*, 462 U.S. 213 (1983) since the "totallity of the circumstances"

> test articulated in *Gates* is the law in this jurisdiction and its application in Hawaii predates *Gates* opinion.

Order Denying Motion to Suppress, *State v. Brown*, Cr. No. 86-1082 (Haw. Cir. Apr. 1, 1987), Exh. "F" to July 12, 1989, Motion, *Brown v. Wong*, Civ. No. 88-2370-07 (Haw. Cir. 1989).

7. At her criminal trial before Circuit Judge Wilfred K. Watanabe, Dr. Brown moved after the State's opening case for a judgment of acquittal, as to which the Court ruled as follows:

> THE COURT: . . . . [L]ooking at the evidence in the light most favorable to the Prosecution, in most of the cases I find that [the Defendant's] argument regarding the evidence being insufficient to establish a prima facie case is not well taken.
>
> We have testimony, statements of patients, the testimony of the employees regarding fifty minute charges as a matter of course, even though the appointment books provide for a 30 minute block for appointments, and also the fact that the employees testified that they confronted the Doctor.
>
> That some of those arguments, I mean those findings also go to your argument that there was no evidence of willful and knowing filing of the false claims[,] Doctor was confronted by her employees and the practice still continued.
>
> As far as no evidence of the rules being violated, the Hawaii Administrative Rules require personal contact, and there was a memo February 5, 1979, to all psychiatrists and psychologists reminding them of the requirement of a personal contact and warning that any claims

> submitted for payment for services, psychiatrists or psychologists does not render personal, shall be treated as a fraudulent billing practice, so there was warning.
>
> As far as nothing in the rules requiring full fifty minute face-to-face therapy, I don't agree with that. I think the rules require personal contact and fifty minutes should mean fifty minutes.
>
> The Motion for Judgment of Acquittal will be granted to Counts 39 through 53 as [to] Miss VanSchoor, since we have no evidence other than the appointments scheduled in the appointment book. Also as to Miss Drake, Counts 119 to 125 the motion will be granted. She did testify as to some short essentials, but she agreed that those were before she went on welfare. And so those counts will be dismissed.
>
> As to all the others, based on the testimony, statements, appointment books, there is enough evidence taking the evidence as a whole, to establish a prima facie case, and so the motion will be denied as to the other counts.

Tr. at 2-5, *State v. Brown*, CR. No. 86-1082 (Mar. 13, 1987), Exh. "G" to July 12, 1989, Motion, *Brown v. Wong*. Civ. No. 88-2370-07.

8. Despite the foregoing, Circuit Judge Watanabe, after hearing all of the evidence, including Dr. Brown's case, and sitting as the unreviewable trier of fact, held that the prosecution did not carry its burden of proof beyond a reasonable doubt, and, at the end of the case, entered judgments of acquittal, ruling:

THE COURT: Good morning. Well, I'll start by saying that I agree with Mr. Geshell that something is definitely wrong with the Medicaid system. Even Dr. Chun,

the psychiatric consultant for DSSH, was confused and inconsistent in his testimony regarding the interpretation of the rules. However, it is not within the jurisdiction of the courts to change the system.

Dr. Dale has referred to the 50-minute face-to-face psychotherapy as a dinosaur, and it seems clear that steps should be taken to change the procedures so that other services can be built for [sic] more specifically, not just lumped together under the 50-minute psychotherapy code. The defendant was part of the system as a provider for several years; she cannot now plead ignorance as to the statute's regulations, newsletters and other publications. She collected significant sums from the system, and it was up to her to play by the rules, and she apparently did not.

After reviewing all of the evidence, it seems reasonably clear to me that defendant was probably overcharging the system. The defendant's appointment book show [sic] appointments scheduled at 15 or 30 minute intervals in many cases. Mrs. Hernando testified as to being in defendant's office with Addie Farr for 20-25 minutes [sic] sessions; John Gesant testified as an average of 15 minute visits with only two or three visits of up to 15 minutes. Felila Dela Pina testified as to 10 to 15 minute sessions, and no 45 to one hour session.

Lina Belen testified that her last four visits were timed at the request of the investigators, and those were for 15 minutes. The investigator testified that they were on April 26th, May 17th, June 2nd and June 19th, but Lina Belen's last four visits were actually on July 18th, August 15th, and September 13th and November 3rd, and those

dates were not all part of the indictment. B.J. Kam testified as to 15 to 20 minute sessions merely to get her medications; Jennifer Keao, Anna Silva, Sandra Brown, Jonie Wilson all testified to short sessions.

Even defendant's employees testified that the defendant was seeing patients for less than 50 minutes, but billing for 50 minutes. Sadie Kobayashi also testified that she didn't feel good about it, and confronted the defendant about the practice; however, Mrs. Kobayashi could not recall specific dates when the defendant saw patients for less than 50 minutes and charged for 50. In fact, none of the witnesses except Lina Belen could testify as to any specific dates involved, and Ms. Belen's testimony was not conclusive because of the discrepancy in referring to the last four visits.

> All of the State's witnesses could only testify vaguely as to the times of their short sessions, and it would have been a relatively simple matter for the investigators to accompany the patients and to time the sessions, but this was not done. I'm left with a 134 count indictment, but I'm unable to match up any of the evidence with the specific counts in the indictment, and accordingly, I find that the State has not sustained its burden of proof beyond a reasonable doubt, and I have to find the defendant not guilty of all remaining counts.

Tr. at 1-4, *State v. Brown*, Cr. No. 86-1082 (Haw. Cir. Apr. 29, 1987), Exh. "G" to July 12, 1989, Motion, *Brown v. Wong*. Civ. No. 88-2370-07 (Haw. Cir. 1989); *see also* Exh. "I" (acquittal).

9. This action was filed on July 29, 1988, and names as Defendants two investigators, Donald Wong and Clyde

Vierra, who at the relevant times were employed by the Medicaid Fraud Control Unit established pursuant to federal and state law in the Department of the Attorney General, State of Hawaii. Plaintiff has also named as defendants the former Director of Human Services (DHS), Franklin Y.K. Sunn, and the former Health Care Administrator for the Department, Earl Motooka. In January, 1987, Mr. Sunn was succeeded by Winona Rubin, as Director of DHS. In July - December, 1986, Mr. Motooka's position at DHS was held by Judy Oka. Mr. Motooka has been recently succeded as Health Care Administrator by Ms. Winifred Odo. Notice of Appeal dated Jan. 16, 1990. Investigators Wong and Vierra, former Director Sunn, and former Administrator Motooka, are sued both in their official and individual capacity. Also named as defendants are the State of Hawaii, and the Department of Human Services, State of Hawaii. The Complaint asserts claims that purport to arise under 42 U.S.C. § 1983 (Count VI), and under common law (Counts I, III, IV, and V). Also asserted, against the State of Hawaii and the Department of Social Services, is a claim for "breach of contracts" (Count II). The Complaint's prayer seeks monetary, and no equitable, relief.

10. State officials sued in their personal capacities, in certain instances, are entitled in certain instances to qualified immunity for alleged violations of the Constitution, statutes, and laws of the United States redressable under 42 U.S.C. § 1983, and for common law torts. Under qualified immunity, monetary relief may not be awarded against State officials, sued in their personal or individual capacities under 42 U.S.C. § 1983, unless the officials objectively acted in bad faith in depriving Plaintiff of her

clearly established federal rights. *See Makanui v. Department of Education*, 6 Haw. App. 397, 721 P.2d 165 (1986) (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). Before a Court may impose personal liability on a public official on the basis of state common law in the absence of absolute immunity, Plaintiff must demonstrate by clear and convincing proof that the official from whom damages are sought was motivated by malice. *See Towse v. State*, 64 Haw. 625, 647 P.2d 696 (1982).

11. In addition, in certain instances government officers not otherwise entitled to immunity may enjoy derivative immunity. Thus, officials sued in their individual capacities for breaches of federal law redressable under 42 U.S.C. § 1983, or for common law torts, may, under certain facts, be entitled to absolute judicial immunity derived from the intervention of a judicial officer. *Bullen v. DeRego*, 68 Haw. 587, 724 P.2d 106 (1986) (citing *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982); *Ames v. United States*, 600 F.2d 183 (8th Cir. 1979); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); *Rodriguez v. Ritchey*, 556 F.2d 1185 (5th Cir.), *cert. denied*, 434 U.S. 1047 (1977)).

12. In the instant case, the State officials sued in their personal or individual capacities have valid defenses, which exist as a matter of law, and which cannot be refuted on the record presented, based on the doctrines of qualified immunity or absolute derivative immunity, as applied to all claims arising under 42 U.S.C. § 1983, and under the Hawaiian common law. Counts I and IV allege common law torts against, *inter alia*, the State officials in their individual or personal capacities.

Under *Bullen* and the cases cited therein, absolute derivative immunity is a defense to common law claims where there has been judicial intervention which breaks the chain of causation. Clearly, in this case, two judges intervened between the alleged wrongful acts of the officials and the trial of the plaintiff. All of the defects concerning the indictment and the search were presented in the pretrial motions. Nevertheless, the indictment was not dismissed, and the evidence was not suppressed. Per *Bullen*, the intervening acts of the judges shield the accused officials and warrant dismissal of the claims in Counts I, and IV. The same reasoning also warrants dismissal of the § 1983 claims against the State officials in their individual or personal capacities.

13. No claims per Count III (Negligent Administration of the Medicaid Program) are cognizable against the State officials sued in their individual or personal capacities (or in any other capacity or against the State or DHS) because no legal duty was owed by the State or its administrators to Plaintiff to properly administer the Medicaid program. Accordingly, for the reasons above, all claims pleaded against the State officials (defendants Wong, Vierra, Motooka, and Sunn) in their individual or personal capacities are dismissed with prejudice on the record herein.

14. Claims purporting to arise under 42 U.S.C. § 1983 may not be maintained against the State, its departments, or its officials who are sued in their official capacities. *See Will v. Michigan*, 109 S. Ct. 2304 (1989); *Makanui v. Department of Education, supra*, 6 Haw. at 406, 721 P.2d at 171 (citing *Quern v. Jordan*, 440 U.S. 332, 341 (1979)). All claims arising under 42 U.S.C. § 1983 against

the State, DHS, or Defendants Wong, Vierra, Motooka, or Sunn, are barred by sovereign immunity, and therefore are subject to dismissal pursuant to Haw. R. Civ. P. 12(b)(l), or, alternatively, for failure to state a claim. *Id.* at (b)(6).

14. A claim against the State or its agencies (or its officers sued in their official capacities) for damages upon a common law tort may not be brought for claims exempted by Chapter 662-15, Haw. Rev. Stat. *Washington v. Fireman's Fund Ins. Cos.*, 68 Haw. 192, 198, 708, 129, 133 (1985); *Helela v. State*, 49 Haw. 365, 369, 418 P.2d 482, 485 (1966). In addition, under Haw. Rev. Stat. § 662-2, the State, its agencies (or its officers sued in their official capacities) for damages may invoke an employee's immunity under an applicable immunity doctrine to shield the state treasury from judgment. *Hulsman v. Hemmeter Dev. Corp.*, 65 Haw. 58, 61-62, 647 P.2d 713, 717 (1982) (note omitted).

15. Plaintiff's claim for Tortious Interference with Contracts (Count V) is clearly prohibited by Haw. Rev. Stat. § 662-15(4) (1985), and therefore is dismissed, insofar as alleged against the State, DHS, and remaining defendants in their official capacities. There is no jurisdiction for this Claim.

16. Plaintiff's remaining tort claims are crafted to avoid a defense based upon the statuory exclusions set forth at Haw. Rev. Stat. § 662-15 (1985), since the allegations speak in terms of Negligent/Intentional Infliction of Emotional Distress (Count I), Negligent Administration of the Medicaid Program (Count III), and Violation of

Privacy Rights (Count IV). In any case, however, the claims must be dismissed on the basis of other grounds.

17. No claims per Count III are cognizable against the State, DHS, or state officials in any capacity, since no legal duty was owed by the State or its administrators to Plaintiff to properly administer the Medicaid Program. Thus, Count III is dismissed not only against State officials sued in their individual or personal capacities, but also against the State, DHS, and the State officials sued in their official capacities.

18. Because Counts I and IV cannot be maintained against the State officials in their individual or personal capacities on the basis of the absolute derivative immunity recognized by the *Bullen* decision and the cases cited therein, these Counts must also be dismissed against the State, DHS, and the officials sued in their official capacities. *Hulsman, supra*; H.R.S. § 662-2.

19. Count II, the "Breach of Contracts" claim, which is pleaded against Defendants State and DHS, states a claim for relief against the State entities and will not be dismissed.

20. IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that all Counts against Defendants Wong, Vierra, Sunn, and Motooka, whether against said defendants in their official, or personal, or individual capacity, are dismissed on the record presented. IT IS ALSO THEREFORE ORDERED, ADJUDGED, AND DECREED that all remaining claims (those against the State and DHS), with the exception of that stated in Count II of the Complaint, the "Breach of Contracts" claim, are also dismissed on the record presented. IT IS

ORDERED, ADJUDGED, AND DECREED that Count II, on which the State and DHS are the only defendants, is not dismissed.

Dated: Honolulu, Hawaii, March 5, 1990

/s/ Robert G. Klein
Hon. Robert G. Klein
Circuit Judge of the
First Circuit

Approved as to Form:

/s/ Not approved R. Steven Geshell
R. STEVEN GESHELL, Esq.
Attorney for Plaintiff

Approved as to Form, and
as to the Judgment with the
Exception of Paragraph 19,
and that part of Paragraph 20
that is adverse to Defendants.

/s/ Steven S. Michaels
WARREN PRICE, III
Attorney General
State of Hawaii
Steven S. Michaels
Deputy Attorney General
Attorneys For Defendants

Order Granting in Part, and Denying in Part, Defendants' Motion for Judgment on the Pleadings, Or, in the Alternative, for Summary Judgment, *Brown v. Wong*, No. 88-2370-07 (Haw. Cir. 1990).

NO. 14443

IN THE SUPREME COURT OF THE STATE OF HAWAII

CAROL A. BROWN, M.D., Plaintiff-Appellant. vs. DONALD WONG; CLYDE VIERRA; FRANKLIN Y.K. SUNN; EARL MOTOOKA; THE STATE OF HAWAII; DEPARTMENT OF HUMAN SERVICES, formerly the Department of Social Services and Housing of the State of Hawaii, Defendants-Appellees, and JOHN DOES 1 through 10; DOE CORPORATIONS 1 through 10; and DOE UNINCORPORATED ASSOCIATIONS, INCLUDING PARTNERSHIPS 1 through 10, Defendants.	CIVIL NO. 88-2370 APPEAL FROM THE ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS, Or, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT FIRST CIRCUIT COURT HONORABLE SIMEON ACOBA, JR. HONORABLE PHILIP T. CHUN HONORABLE RONALD MOON HONORABLE ROBERT G. KLEIN Judges

JUDGMENT ON APPEAL

CERTIFICATE OF SERVICE

(Filed April 15, 1989)

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NO. 14443

IN THE SUPREME COURT OF THE STATE OF HAWAII

CAROL A. BROWN, M.D., Plaintiff-Appellant. vs. DONALD WONG; CLYDE VIERRA; FRANKLIN Y.K. SUNN; EARL MOTOOKA; THE STATE OF HAWAII; DEPARTMENT OF HUMAN SERVICES, formerly the Department of Social Services and Housing of the State of Hawaii, Defendants-Appellees, and JOHN DOES 1 through 10; DOE CORPORATIONS 1 through 10; and DOE UNINCORPORATED ASSOCIATIONS, INCLUDING PARTNERSHIPS 1 through 10, Defendants.	CIVIL NO. 88-2370 APPEAL FROM THE ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS, Or, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT FIRST CIRCUIT COURT HONORABLE SIMEON ACOBA, JR. HONORABLE PHILIP T. CHUN HONORABLE RONALD MOON HONORABLE ROBERT G. KLEIN Judges

JUDGMENT ON APPEAL

Pursuant to the Memorandum Opinion of the Supreme Court of Hawaii entered in this appeal on February 14, 1991, the Order of the Circuit Court for the First

Circuit Granting in Part, and Denying In Part, Defendants' Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment, and filed March 7, 1990, insofar as it grants summary judgment in favor of Defendants, and against Plaintiff, on counts I, III, IV, and VI of Plaintiff's Complaint, is hereby affirmed. Plaintiff-Appellant does not challenge the grant of summary judgment as tortious interference of contracts (court V). The order of March 7, 1990, in the action below is therefore also affirmed as to the dismissal of count V of the Plaintiff's Complaint.

Dated: Honolulu, Hawaii, APR 15 1991.

BY THE COURT:

/s/ L. Nakagawa
Clerk

Approved:
/s/ James H. Wakatsuki (seal)
Justice

CERTIFICATE OF SERVICE

I hereby certify that, on April 8, 1991, a true copy of the foregoing was duly served on R. Steven Geshell, Suite 1104, 1088 Bishop Street, Honolulu, Hawaii 96813, by placing the same into the United States mails, addressed to the aforestated address.

Dated: Honolulu, Hawaii, April 8, 1991.

/s/ Steven S. Michaels
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CAROL A. BROWN, M.D., Plaintiff, vs. DONALD WONG, et al., Defendants.	Civil No. 88-2370-07 ORDER UPON PLAINTIFF'S NON-HEARING MOTION TO COMPEL DISCOVERY NON HEARING MOTION FILED APRIL 27, 1989 JUDGE: THE HON. ROBERT G. KLEIN NO TRIAL DATE SET

ORDER UPON PLAINTIFF'S NON-HEARING MOTION TO COMPEL DISCOVERY

Plaintiff's Non-Hearing Motion to Compel Discovery was filed on April 27, 1989, and Defendants' Response thereto was timely filed pursuant to stipulation and order on May 16, 1989. Based upon due consideration of the motion, memoranda, and exhibits filed in this matter, and for good cause shown, it is hereby Ordered that discovery is stayed for sixty (60) days from the date of entry of this

Order pending receipt of any motions plaintiff or defendants may file on the issue of sovereign immunity.

Dated: Honolulu, Hawaii, JUN 1 1989.

/s/ Robert G. Klein (seal)
The Hon. Robert G. Klein
Circuit Judge of the
First Circuit

/s/ R. Steven Geshell
R. Steven Geshell
Attorney for Plaintiff

Order Upon Plaintiff's Non-Hearing Motion to Compel Discovery, *Brown v. Wong*, No. 88-2370-07 (Haw. Cir. Motion of 4/27/88).

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CAROL A. BROWN, M.D. Plaintiff, vs. DONALD WONG; CLYDE VIERRA; FRANKLIN Y.K. SUNN; EARL MOTOOKA; THE STATE OF HAWAII; DEPARTMENT OF HUMAN SERVICES, formerly the Department of Social Services and Housing of the State of Hawaii; JOHN DOES 1 through 10; and DOE UNINCORPORATED ASSOCIATIONS, INCLUDING PARTNERSHIPS 1 through 10, Defendants.	Civil No. 88-2370-07 ORDER GRANTING ALL DEFENDANTS' MOTION FOR PROTECTIVE ORDER FROM ORAL HEARING Date: January 24, 1990 Time: 9:30 a.m. Judge: Hon. Robert G. Klein Trial Week: Continued

ORDER GRANTING ALL DEFENDANTS' MOTION FOR PROTECTIVE ORDER

This matter came on for hearing on January 24, 1990, before the Hon. Robert G. Klein, Circuit Judge of the First Circuit, on All Defendants' Motion for Protective Order. Appearing for Defendants Donald Wong, Clyde Vierra, Franklin Y.K. Sunn, Earl Motooka, the State of Hawaii, and the Department of Human Services ("All Defendants"), as well as added movant Deputy Attorney General Peter Yee was Steven S. Michaels, Deputy Attorney General. Appearing on behalf of Plaintiff Carol A. Brown, M.D., was R. Steven Geshell, Esq. Having reviewed the papers presented on this motion, and the arguments of counsel, and being informed in the premises, the Court, finding that there is good cause and legal support therefore [sic], hereby orders that All Defendants' Motion for Protective Order is, and hereby shall be, GRANTED. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir. 1989) (and cases cited therein).

IT IS HEREBY ORDERED that all discovery is STAYED. This stay shall remain in effect pending final disposition, including any interlocutory appeal prosecuted from the denial thereof, of Defendants' Motion filed July 12, 1989, for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment.

Dated: Honolulu, Hawaii, February 22, 1990.

/s/ Robert G. Klein
Judge of the Above-
Titled Court

Approved as to Form:

/s/ R. Steven Geshell
R. Steven Geshell

Order Granting All Defendants' Motion for Protective Order, *Brown v. Wong et al.*, No. 88-2370-07 (Haw. Cir. filed 1988).

Art. I-Sec. 10 UNITED STATES CONSTITUTION

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports of Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the Untied States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

AMENDMENTS – CONSTITUTION

[ARTICLE IV.-1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[ARTICLE VI.-1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

[ARTICLE XIV.-1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1396a. State plans for medical assistance

(a) Contents

A State plan for medical assistance must –

(1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

* * *

(3) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness;

* * *

(5) either provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan; or provide for the establishment or designation or a single State agency to administer or to supervise the administration of the plan, except that the determination of eligibility for medical assistance under the plan shall be made by the State or local agency administering the State plan approved under subchapter I or XVI of this chapter (insofar as it relates to the aged) if the State is eligible to participate in the State plan program established under subchapter XVI of this chapter, or by the agency or agencies administering the supplemental security income program established under subchapter XVI or the State plan approved under part A of subchapter IV of this chapter if the State is not eligible to participate in the State plan program established under subchapter XVI of this chapter;

* * *

(7) provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the plan;

* * *

(41) provide that whenever a provider of services or any other person is terminated, suspended, or otherwise sanctioned or prohibited from participating under the State plan, the State agency shall promptly notify the Secretary of such action;

* * *

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

42 U.S.C. § 1985. Conspiracy to interfere with civil rights

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering,

obstructing, or defeating, in any manner, the due course of justice in any State of Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

* * *

42 U.S.C. § 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred to the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the Untied States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the Untied States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330.

42 U.S.C. § 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pub.L. 88-352, Title VI; § 601, July 2, 1964, 78 Stat. 252.

Subpart A – Medicaid Agency Fraud Detection and Investigation Program

42 C.F.R. § 455.12 State plan requirement

As State plan must meet the requirements of §§ 455.13 through 455.21.

[48 FR 3755. Jan. 27, 1983]

§ 455.13 Methods for identification, investigation and referral.

The Medicaid agency must have –

(a) Methods and criteria for identifying suspected fraud cases;

(b) Methods for investigating these cases that –

(1) Do not infringe on the legal rights of persons involved; and

(2) Afford due process of law; and

(c) Procedures, developed in cooperation with State legal authorities, for referring suspected fraud cases to law enforcement officials.

[43 FR 45262, Sept. 29, 1978, as amended at 48 FR 3755, Jan. 27, 1983]

§ 455.14 Preliminary investigation.

If the agency receives a complaint of Medicaid fraud or abuse from any source or identifies any questionable practices, it must conduct a preliminary investigation to determine whether there is sufficient basis to warrant a full investigation.

[48 FR 3756, Jan. 27, 1983]

§ 455.15 Full Investigation.

If the findings of a preliminary investigation give the agency reason to believe that an incident of fraud or abuse has occurred in the Medicaid program, the agency must take the following action, as appropriate:

(a) If a provider is suspected of fraud or abuse, the agency must –

(1) In States with a State Medicaid fraud control unit certified under Subpart C of Part 1002 of this title, refer the case to the unit under the terms of its agreement with the unit entered into under § 1002.309 of this title; or

(2) In States with no certified Medicaid fraud control unit, or in cases where no referral to the State Medicaid fraud control unit is required under paragraph (a)(1) of this section, conduct a full investigation or refer the case to the appropriate law enforcement agency.

(b) If there is reason to believe that a recipient has defrauded the Medicaid program, the agency must refer the case to an appropriate law enforcement agency.

(c) If there is reason to believe that a recipient has abused the Medicaid program, the agency must conduct a full investigation of the abuse.

[48 FR 3756, Jan. 27, 1983, as amended at 51 FR 34788, Sept. 30, 1986]

§ 455.16 Resolution of full investigation.

A full investigation must continue until –

(a) Appropriate legal action is initiated;

(b) The case is closed or dropped because of insufficient evidence to support the allegations of fraud or abuse; or

(c) The matter is resolved between the agency and the provider or recipient. This resolution may include but is not limited to –

(1) Sending a warning letter to the provider or recipient, giving notice that continuation of the activity in question will result in further action;

(2) Suspending or terminating the provider from participation in the Medicaid program;

(3) Seeking recovery of payments made to the provider; or

(4) Imposing other sanctions provided under the State plan.

[43 FR 45262, Sept. 29, 1978, as amended at 48 FR 3756, Jan. 27, 1983]

§ 455.17 Reporting requirements.

The agency must report the following fraud or abuse information to the appropriate Department officials at intervals prescribed in instructions.

(a) The number of complaints of fraud and abuse made to the agency that warrant preliminary investigation.

* * *

---

42 C.F.R. § 455.21 Cooperation with State Medicaid fraud control units.

In a State with a Medicaid fraud control unit established and certified under Subpart D of this part:

(a) The agency must –

(1) Refer all cases of suspected provider fraud to the unit;

(2) If the unit determines that it may be useful in carrying out the unit's responsibilities, promptly comply with a request from the unit for –

(i) Access to, and free copies of, any records or information kept by the agency or its contractors;

(ii) Computerized data stored by the agency or its contractors. This data must be supplied without charge and in the form requested by the unit; and

(iii) Access to any information kept by providers to which the agency is authorized access by section 1902(a)(27) of the Act and § 431.107 of this subchapter. In using this information, the unit must protect the privacy rights of recipients; and

(3) On referral from the unit, initiate any available administrative or judicial action to recover improper payments to a provider.

(b) The agency need not comply with specific requirements under this subpart that are the same as the responsibilities placed on the unit under Subpart D of this part.

Hawaii Administrative Rules

§ 17-747-12 *Preliminary investigations.* (a) DSSH shall conduct a preliminary investigation of all fraud and abuse complaints from whatever source received to determine whether there is sufficient merit to warrant a full investigation.

(b) If the findings of the preliminary investigation reveal sufficient evidence of fraud or abuse to support the complaint or allegation, DSSH shall refer the case to the medicaid fraud control unit. [Eff. JUL 19 1982] (Auth: HRS §346-14) (Imp: 42 C.F.R. §455.13, 455.14)

§17-747-13 *Full investigation by the medicaid fraud control unit.* The medicaid fraud control unit shall investigate all cases of suspected provider fraud or abuse referred by the department to determine:

(1) The facts presented reveal any criminal violations of the law relating to the medical assistance program; and

(2) There is sufficient evidence whether to support a criminal fraud conviction or a civil cause of action against the provider.

[Eff. JUL 19 1982] (Auth: HRS §346-14) (Imp: 42 C.F.R. §455.13, 455.15)

§17-747-14 *Resolution of investigation.* (a) An investigation shall continue until:

(1) Appropriate criminal or civil legal action is initiated;

(2) The case is closed because of insufficient evidence to support the allegations of fraud or abuse; or

(3) The matter is resolved between the department and the provider through any one or appropriate combination of the following actions:

(A) A warning letter to the provider giving notice that continuation of any improper activity will result in administrative action or civil or criminal suit by the State;

(B) The suspension of the provider from certification as a provider with a medical assistance program;

(C) Termination of the provider from participation as a provider in the medical assistance program; or

(d) A demand letter is sent to the provider requiring repayment of overpayments to that provider made by the medical assistance program and warning the provider that payment on that provider's pending claims may be withheld in part or in whole to be applied to overpayments previously made to the provider by the medical assistance program.

(b) In the event that the medicaid fraud control unit is unable to determine whether the actions of a provider constitute improper medical practice then the medicaid fraud control unit may request an opinion of the Hawaii medical association peer review committee. [Eff. JUL 19 1982] (Auth: HRS §346-14) (Imp: 42 C.F.R. §§455.13, 455.14, 455.15, 455.16)

§17-747-15 *Suspension or termination.* (a) The decision to suspend or terminate a provider from participation in the medical assistance program and the duration of any suspension shall be made by the DSSH director.

(b) The duration of the suspension imposed by the DSSH director shall be conditioned upon the seriousness of the infraction but shall not exceed a period of five years.

(c) The DSSH director shall suspend or terminate any provider in the medical assistance program who has been suspended or terminated from the medicare program. Suspension or termination from the medical assistance program if based upon suspension from the medicare program shall be at least under the same conditions and for the same period of time as the suspension from the medicare program. The DSSH director may determine that more stringent action under the medical assistance program than was taken under the medicare program is justified. In that event, the director shall take such steps as the director deems appropriate subject to the provisions of chapter 748 of title 17, Administrative Rules.

(d) The DSSH director shall suspend or terminate any provider in the medical assistance program whose license, certification, authorization or permit to practice has been suspended or revoked by a state or federal government, court, or agency.

(e) A provider who has terminated from the medical assistance program for a violation may not petition the director for reinstatement to the program for a period

of five years at which time reinstatement may be permitted by the director if justified, provided that at the time reinstatement is requested, that no medicare sanctions remain applicable.

(f) All legal actions, both civil and criminal, against providers certified under the medicaid program shall be handled by the State's medicaid fraud control unit.

(g) Actions for suspension or termination of a provider may be initiated or continued even though a provider voluntarily withdraws from the program. The procedures for determining whether suspension or termination are appropriate and the length of time shall be governed by chapters 747 and 748 of title 17, Administrative Rules. [Eff. 7/19/82] (Auth: HRS §346-14) (Imp: 42 C.F.R. §§455.16, 455.21)

TITLE 17

DEPARTMENT OF SOCIAL SERVICES AND HOUSING

SUBTITLE 6 PUBLIC WELFARE DIVISION

CHAPTER 748
ADMINISTRATIVE PROCEEDING FOR PROVIDER REVIEW

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§17-748-1 *Purposes.* The purpose of this chapter shall be to establish provisions for a provider's right to review and hearing following any administrative decision made by the department of social services and housing which directly and adversely affects the rights of that provider or the reimbursement claimed under the medical assistance program. [Eff 7/19/82; am and comp AUG 9 1985] (Auth: HRS §346-14; 42 C.F.R. §431.10) (IMP: HRS §346-14; 42 C.F.R. §§431.10, 455.12)

§17-748-2 *Definitions.* As used in this chapter:

"Abuse" means to put to a wrong or improper use the health care services available under the Hawaii medical assistance program. It includes but is not limited to, providing or receiving health care services where no medical need exists, providing or receiving health care

services where the recipient is not legally entitled to medicaid, providing or receiving services in excess of that medically needed by the recipient, presenting a claim for services not provided, or presenting a claim for services in excess of those actually provided or needed. Abuse may exist where the provider or recipient acts negligently or recklessly.

"Determination" means the amount of reimbursement due to a provider under the medicaid program for a cost reporting period as summarized on the notice of program reimbursement (NPR).

"DSSH" means the department of social services and housing.

"Fraud" means the knowing and willful making, or causing to make, by any person in the medical assistance program of any false statement or representation of material fact in any application for benefits or payment for furnishing services or supplies, or for the purpose of obtaining greater compensation than the person is legally entitled to, or for obtaining authorization for furnishing services or supplies. If any of the conditions stated above exist, then there is fraud whether or not any payments is actually received from the Hawaii medical assistance program. For purposes of this chapter, fraud may exist whether or not a judgment has been made by a criminal court of law.

"HHS" means the United States Department of Health and Human Services.

"Medical assistance program" includes, but is not limited to, medicaid and all medical services provided to clients under the general assistance category.

"Provider" means an individual or entity which furnishes health care goods or services such as those authorized for payment under the Hawaii medical assistance program. It covers all persons or entities validly licensed or permitted to provide health care services. Providers shall be certified by the Hawaii medical assistance program.

"Suspension" means exclusion of a provider from participation in the Hawaii medical assistance program by withdrawing the provider's certification for a specified period of time. At the conclusion of the time specified in the suspension, the suspension expires and certified provider status resumes without further action.

"Termination" means an exclusion of a provider from participation in the Hawaii medical assistance program by withdrawing the provider's certification. Termination is not for a specified period of time and absent provider application for certification, remains permanent. [Eff 7/19/82; am and comp AUG 9 1985] (Auth: HRS §346-14; 42 C.F.R. §431.10) (Imp: HRS §346-14; 42 C.F.R. §431.10)

SUBCHAPTER 1

GENERAL PROVISIONS FOR PROVIDER REVIEW

§17-748-3 *Providers' right to review.* (a) A provider may request a fair hearing following the department's administrative decision to do any one of the following:

(1) Withhold, terminate, or suspend a provider's certification to participate in the medical assistance program;

(2) Withhold payment of claims as a result of audit or investigation;

(3) Recover money claimed to have been overpaid to the provider by medicaid; or

(4) Act in a manner disagreeable to the provider relating to level of care, medical necessity, medical appropriateness, or on claims for service.

(b) Any notice of intent to do any of the actions specified in paragraph (a) shall be sent to the provider by certified mail. The provider shall have thirty days from the date that notification is mailed to request in writing a fair hearing. There shall be no required format for the provider's written request for fair hearing, through the provider must clearly state that the provider requests a fair hearing. At the time the provider requests a fair hearing, the provider shall include with the request all documents and written evidence that the provider wishes to be considered at the hearing. Where a provider makes a timely request for a fair hearing, the provider shall not be terminated or suspended until the hearing has been held and a decision has been rendered.

(c) DSSH may suspend or terminate a provider from the medicaid program for one or more of the following reasons:

(1) Failure by the provider to maintain with DSSH a signed agreement identifying the terms and conditions under which the provider may participate in the Hawaii medical assistance program;

(2) Refusal or failure by the provider to make available at the provider's place of business or at an appropriate location, either during normal business hours, or at the mutual convenience of the parties, immediate access to all records and all diagnostic devices required to be maintained by section 346-40(b), HRS;

(3) Refusal or failure by a provider without reasonable justification to keep those adequate written records necessary to disclose fully the type and extent of health care, services, or supplies provided to medicaid recipients as provided by section 346-40(a) and (c), HRS;

(4) Revocation or suspension of the provider's license, certification, authorization, or permit to practice or provide service in the provider's health care specialty by a state or federal government, court, or agency;

(5) Criminal complaint, indictment by grand jury, or information about or conviction of the provider by a state of [sic] federal court for an offense involving the provider's participation in the medicaid program. Criminal complaint, indictment, or information may remain the basis for a suspension or termination by the department even though the complaint, information, or indictment results in acquittal;

(6) Any fraud against the medicaid program or abuse of health care services as defined in this section;

(7) A determination by a peer review organization that the provider has failed to provide adequate quality services to medicaid recipients as judged against accepted medical community standards in Hawaii;

(8) Any intentional failure to repay overpayments made by the medicaid program to the provider; or

(9) Any effort by the provider to interfere with, hinder, or stop an investigation by any state or federal agency into fraud or abuse in the medicaid program.

(d) During the period of time from the notice of suspension or termination until the department orders a decision after fair hearing, payment on any claims of the provider requesting review shall, at the medical care administrator's discretion, be withheld pending the hearing officer's final determination. If the fair hearing officer upholds suspension or termination, decides that the contested claim shall not be paid, or renders a decision denying the provider's appeal, then the provider claims for which payment was withheld shall not be paid. If, after fair hearing, the fair hearing officer overturns a provider's suspension or termination, decides that any contested claims shall be paid, or renders a favorable decision on the provider's appeal, then the provider claims for which payment was withheld shall be paid.

(e) A provider may request fair hearing only after an administrative decision by the department against that provider. There shall be no right of hearing for class actions on the part of other providers and there shall be no right to fair hearing for the purpose of obtaining advisory opinions. [Eff 7/19/82; am 12/21/84; comp AUG 9 1985] (Auth: HRS §346-14; 42 C.F.R. §431.10) (Imp: HRS §§346-40, 346-14; 42 C.F.R. §§431.10, 455.13)

§17-748-4 *Limitation of the right to review.* A provider shall not have a right to a fair hearing if:

(1) The provider fails to request in writing a fair hearing from the medical care administrator of DSSH within the time specified in section 17-748-3(b);

(2) The administrative action is one of suspension or termination, based upon a final administrative decision of a state or federal agency withdrawing the license, certification, authorization, or permit of the provider to practice or furnish the health care specialty for which the provider is certified under the Hawaii medical assistance program; or

(3) The administrative action is for suspension or termination and is based upon a state or federal court conviction of the provider of an offense involving fraud or abuse relating to the medicaid program. [Eff 7/19/82; am and comp AUG 9 1985] (Auth: HRS §346-14; 42 C.F.R. §431.10) (Imp: 42 C.F.R. §§431.10, 455.16)

§17-748-5 *Appearance by representatives of the provider and the department.* (a) In all matters involving a fair hearing, a provider may choose representation by themselves or by an attorney or other person. A provider shall not have a right to legal counsel appointed at state expense. If the provider is represented by another person, that person's name, address, and telephone number shall be provided to the DSSH medical care administrator prior to the fair hearing.

(b) Upon receipt of the name of the provider's representative, the medical care administrator shall provide to that representative, the name, address, and telephone number of the department's representative. [Eff 7/19/82;

am and comp AUG 9 1985] (Auth: HRS §346-14; 42 C.F.R. §431.10) (Imp: HRS §91-9; 42 C.F.R. §455.13)

§17-748-6 *Forms for papers.* An original and two copies of all papers filed in any proceeding under this chapter shall be filed with the department, shall be typewritten on one side only, and be on 8 1/2 by 13 inch white paper. Documents shall bear on the first page the title of the proceeding at the top of the page, together with any administrative or court number assigned to the hearing, and the signatures of the party or the party's representative. [Eff 7/19/82; am and comp AUG 9 1985] (Auth: HRS §346-14; 42 C.F.R. §431.10) (Imp: HRS §346-14; 42 C.F.R. §431.10)

§17-748-7 *Notice, service, and proof of service.* (a) All papers, notices, and other documents shall be served by the party offering them upon all other parties to the proceeding. Proof of service upon the parties shall be filed with the DSSH.

(b) Service of process may be accomplished in any manner permitted by law. The department shall serve the provider in person or by mail. If the provider is represented by an attorney or other person, service upon that attorney or other person shall be sufficient.

(c) Proof of service of any document shall be by certificate of attorney, affidavit, or acknowledgment.

(d) Where written notice is required by this chapter, notice shall be considered effective on the date of mailing. [Eff 7/19/82; am and comp AUG 9 1985] (Auth: HRS §346-14; 42 C.F.R. §431.10) (Imp: HRS §91-9; 42 C.F.R. §455.13)

§17-748-8 *Notice of formal hearing; notice of decision.* (a) The department shall notify any provider who requests a fair hearing of the scheduled date and location of the fair hearing. Such notice shall be in writing and mailed to the provider no fewer than thirty calendar days before the scheduled date of hearing.

(b) The department shall notify any provider who has received a fair hearing of the hearing officer's decision by mailing a written copy of the decision within fourteen calendar days of the date of the decision. [Eff 7/19/82; am and comp AUG 9 1985] (Auth: HRS §346-14; 42 C.F.R. §431.10) (Imp: HRS §§91-9, 91-9.5; 42 C.F.R. §455.13)

§17-748-9 *Conduct of hearing.* (a) The hearing shall be conducted by an impartial hearing officer appointed by the DSSH director. Prior to conducting the hearing, the hearing officer shall become familiar with sections 84-1 to 84-19, HRS, and the published opinions of the state ethics commission and determine that participation as fair hearing officer will create no conflicts of interest or ethical violations.

(b) Testimony shall be taken only on oath or affirmation and such testimony shall be subject to sections 710-1060, 710-1061, and 1062, HRS.

(c) Each party may:

(1) Call and examine witness;

(2) Introduce exhibits into evidence;

(3) Cross-examine witnesses called by the other party;

(4) Object to the presentation of any evidence deemed by the party to be not properly admitted;

(5) Present rebuttal evidence to the opposing party's case-in-chief; and

(6) Present an opening statement to the hearing officer prior to the taking of evidence, and a closing argument to the hearing officer at the conclusion of the taking of evidence.

(d) The hearing officer shall not require strict adherence to any rules of evidence. The hearing officer shall admit all evidence including, but not limited to, testimony, documents, photographs, opinions, objects, or diagrams, so long as that evidence has any tendency to make the existence of any fact of consequence to the hearing more or less probable than it would be without the evidence. The hearing officer may, in the hearing officer's discretion, allow the presentation or hearsay evidence, allow cross-examination beyond the scope of direct examination, and allow the party calling a witness to cross-examine or impeach that witness. Rulings on evidence made by the fair hearing officer shall be in the officer's discretion and not subject to appeal.

(e) The hearing officer, if the hearing officer wishes, may ask questions of any witness or request production of further evidence by any party to the hearing.

(f) The fair hearing officer shall have discretion to exclude irrelevant, immaterial, or unduly repetitious evidence as provided in section 91-10(1), HRS.

(g) In fair hearings, the provider shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The amount of proof necessary to prevail shall be a preponderance of the evidence in accordance with section 91-10(5), HRS. [Eff 7/19/82; am and comp AUG 9 1985] (Auth: HRS §346-14; 42 C.F.R. §431.10) (Imp: HRS §91-10; 42 C.F.R. §455.13)

§17-748-10 *Witnesses and subpoenas.* (a) Each party to the fair hearing shall arrange for the presence of its witnesses at the hearing.

(b) The DSSH director hereby designates the hearing officer as a representative of the director, empowered to conduct a hearing. Any party to the fair hearing may request of the hearing officer a subpoena to compel the attendance of a witness or the production of books, papers, documents, or other objects deemed relevant to the investigation, except that no subpoena shall affect any privilege established by law. Each subpoena shall be signed by the fair hearing officer who at any point in the proceedings may, on the hearing officer's own motion, subpoena witnesses, books, papers, documents, correspondence, memoranda, or other records in furtherance of the fair hearing.

(c) Applications for subpoenas for the production by a witness of books, papers, documents, correspondence, memoranda, or other written records, shall be made by affidavit to the hearing officer and shall contain:

(1) The name and address of the person or organization upon whom the subpoena is to be served;

(2) A description of the documents, papers, books, correspondence, memoranda, photographs, or other written records that are desired;

(3) A statement by the affiant that to the best of the affiant's knowledge and belief, the person to be subpoenaed has information about or possesses the documents, papers, books, correspondence, memoranda, photographs, or other objects that the subpoena seeks; and

(4) The basis for the affiant's belief that the person or organization has information about or possesses the documents, papers, books, correspondence, memoranda, photographs, or other objects that the subpoena seeks.

(d) Each party to the fair hearing shall arrange for the service of all subpoenas issued on its behalf. A copy of the affidavit in support of the issuance of the subpoena shall be served along with the subpoena.

(e) All witnesses who are summoned to a fair hearing by subpoena may claim witness fees and mileage allowance at the same rate established for witnesses in the circuit court of the first circuit of the State. [Eff 7/19/82; am and comp AUG 9 1985] (Auth: HRS §346-14; 42 C.F.R. §431.10) (Imp: HRS §§346-13, 92-16; 42 C.F.R. §455.13)

§17-748-11 *Amendments.* (a) If during the course of the hearing, evidence taken reveals that the provider was involved with conduct which would properly be the basis for suspension, termination, or other administrative sanction, and which was not alleged by the State as grounds

for suspension, termination, or other administrative sanction, the State, at the discretion of the hearing officer, may amend its allegations to conform with the evidence.

(b) If, during the course of a fair hearing, it becomes apparent to either party or to the fair hearing officer that an absent party should be joined or afforded the opportunity to make an appearance, then the State, at the discretion of the hearing officer, may amend its allegations to include the additional party, or if appropriate, substitute the additional party for the present provider.

(c) Where allegations are amended pursuant to subsection (a), or parties are added or substituted pursuant to subsection (b), the fair hearing shall be continued for the length of time the hearing officer deems appropriate to afford any additional party notice and to afford any existing or additional party a chance to address additional allegations.

(d) Notice of amendments or substitutions shall be mailed in writing to the last known address of each party affected by the amendment or substitution. [Eff 7/19/82; am and comp AUG 9 1985] (Auth: HRS §346-14; 42 C.F.R. §431.10) (Imp: HRS §346-14; 42 C.F.R. 455.13)

§17-748-12 *Continuances or further hearings.* (a) At any time during the fair hearing, if the hearing officer determines that the hearings shall be held at another time or at any other locations in the State, the hearing officer, at the hearing officer's discretion or on the motion of any party, may continue the hearing.

Hawaii Administrative Rule

§17-749-11 *Definitions.* For the purpose of the subchapter:

"Conjoint therapy" means treatment involving two family members only and shall be considered a form of individual therapy.

"Consultation" means an opinion or advice requested by a practicing physician from a psychiatrist or psychologist.

"Crisis intervention" means a process providing time limited services to reduce a stressful situation or help a patient deal with stress more effectively.

"Direct supervision" means a psychiatrist shall be present and available in an inpatient facility or outpatient clinic to provide assistance and direction to non-physician therapists.

"Emergency psychiatric care" means immediate relief or help to a person who has decompensated in the face of internal or external stress and who is unable to cope with the situation.

"Family therapy" means treatment involving three or more members of the same family and shall be considered a form of group therapy.

"Group psychotherapy" means a method of psychotherapeutic treatment involving interaction between patients and therapist for purposes which otherwise may not be feasible in individual psychotherapy or other modalities of treatment. Group shall consist of six to ten patients.

"Individual psychotherapy" means an interaction between two parties, the therapist and the patient. The term encompasses a wide variety of therapies that differ in intensity and duration.

"Maintenance therapy" means psychiatric treatment of patients who do not require intensive psychiatric care, but who continue to require psychiatric medication and supportive care to maintain a functional state.

"Psychiatric care" means an established mode of practice offering the most effective and humane treatment for the acutely ill.

"Psychiatric evaluation" means a diagnostic interview of a patient that includes history, mental status, and a report of the findings of the interview.

"Psychiatric providers" means those individuals and facilities authorized to provide psychiatric services under the Medicaid Program.

Hawaii Revised Statutes (HRS)

§91-3 Procedure for adoption, amendment or repeal of rules. (a) Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall:

(1) Give at least twenty days' notice for a public hearing. Such notice shall include a statement of the substance of the proposed rule, and of the date, time and place where interested persons may be heard thereon. The notice shall be mailed to all persons who have made a timely written request of the agency for advance notice of its

rulemaking proceedings, and published at least once in a newspaper of general circulation in the State for state agencies and in the county for county agencies.

(2) Afford all interested persons opportunity to submit data, views, or arguments, orally or in writing. The agency shall fully consider all written and oral submissions respecting the proposed rule. The agency may make its decision at the public hearing or announce then the date as to when it intends to make its decision. Upon adoption, amendment, or repeal of a rule, the agency shall, if requested to do so by an interested person, issue a concise statement of the principal reasons for and against its determination.

(b) Notwithstanding the foregoing, if an agency finds that an imminent peril to the public health, safety, or morals or to livestock and poultry health requires adoption, amendment, or repeal of a rule upon less than twenty days' notice of hearing, and states in writing its reasons for such finding, it may proceed without prior notice or hearing or upon such abbreviated notice and hearing as it finds practicable to adopt an emergency rule to be effective for a period of not longer than one hundred twenty days without renewal.

(c) The adoption, amendment, or repeal of any rule by any state agency shall be subject to the approval of the governor. The adoption, amendment, or repeal of any rule by any county agency shall be subject to the approval of the mayor of the county. The provisions of this subsection shall not apply to the adoption, amendment, and repeal of the rules and regulations of the county boards of water supply.

(d) The requirements of subsection (a) may be waived by the governor in the case of the State, or by the mayor in the case of a county, whenever a state or county agency is required by federal provisions to promulgate rules as a condition to receiving federal funds and such agency is allowed no discretion in interpreting such federal provisions as to the rules required to be promulgated; provided that the agency shall make such adoption, amendment, or repeal known to the public by publishing a statement of the substance of the proposed rule at least once in a newspaper of general circulation in the State prior to the waiver of the governor or the mayor. [L 1961, c 103, §3; am L 1965, c 96, §139a; Supp, §6C-3; HRS §91-3; am L 1973, c 13, §1; am L 1979, c 64, §1; am L 1985, c 68, §2]

§91-4 Filing and taking effect of rules. (a) Each agency adopting, amending, or repealing a rule, upon approval thereof by the governor or the mayor of the county, shall file forthwith certified copies thereof with the lieutenant governor in the case of the State, or with the clerk of the county in the case of a county. In addition, the clerks of all of the counties shall file forthwith certified copies thereof with the lieutenant governor. A permanent register of the rules, open to public inspection, shall be kept by the lieutenant governor and the clerks of the counties.

(b) Each rule hereafter adopted, amended, or repealed shall become effective ten days after filing with the lieutenant governor in the case of the State, or with the respective county clerks in the case of the counties.

(1) If a later effective date is required by statute or specified in the rule, the later date shall be the effective date; provided that no rule shall specify an effective date in excess of thirty days after the filing of the rule as provided herein.

(2) An emergency rule shall become effective upon filing with the lieutenant governor in the case of the State, or with the respective county clerks in the case of the counties, for a period of not longer than one hundred twenty days without renewal unless extended in compliance with the provisions of subdivisions (1) and (2) of section 91-3(a), if the agency finds that immediate adoption of the rule is necessary because of imminent peril to the public health, safety, or morals. The agency's finding and brief statement of the reasons therefor shall be incorporated in the rule as filed. The agency shall make an emergency rule known to persons who will be affected by it by publication at least once in a newspaper of general circulation in the State for state agencies and in the county for county agencies within five days from the date of filing of the rule. [L 1961, c 103, §4; am L 1965, c 96, §139b; Supp, §6C-4; HRS §91-4]

CHAPTER 662
STATE TORT LIABILITY ACT

SECTION

662-1 DEFINITIONS
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662-3 JURISDICTION
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662-5 JURY
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662-7 ATTORNEY GENERAL
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662-13 NO AWARDS EXCEPT UPON LEGAL EVIDENCE
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662-15 EXCEPTIONS
662-16 DEFENSE OF STATE EMPLOYEES

§662-1 Definitions. As used in this chapter the term:

"Acting within the scope of his office or employment", in the case of a member of the Hawaii national guard or Hawaii state guard, means acting in the line of duty.

"Employees of the State" includes officers and employees of any state agency, members of the Hawaii

national guard, Hawaii state guard, and persons acting in behalf of a state agency in an official capacity, temporarily, whether with or without compensation.

"State agency" includes the executive departments, boards, and commissions of the State but does not include any contractor with the State. [L 1957, c 312, pt of §1; Supp, §245A-1; HRS §662-1]

§662-2 Waiver and liability of State. The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. [L 1957, c 312, pt of §1; Supp, §245A-2; HRS §662-2; am L 1972, c 164, §2(a)]

§662-3 Jurisdiction. The circuit courts of the State and, except as otherwise provided by statute or rule, the state district courts shall have original jurisdiction of all tort actions on claims against the State, for money damages, accruing on and after July 1, 1957, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the State while acting within the scope of his office or employment. [L 1957, c 312, pt of §1; Supp, §245A-3; HRS §662-3; am L 1978, c 156, §2; am L 1984, c 135, §3]

§662-4 Statute of limitation. A tort claim against the State shall be forever barred unless action is begun within two years after the claim accrues, except in the case of a medical tort claim when the limitation of action provisions set forth in section 657-7.3 shall apply. [L 1957, c 312, pt of §1; Supp, §245A-4; HRS §662-4; am L 1976, c 219, §16]

§662-5 Jury. Any action against the State under this chapter shall be tried by the court without a jury; provided that the court, with the consent of all the parties, may order a trial with a jury whose verdict shall have the same effect as if trial by jury had been a matter of right. [L 1957, c 312, pt of §1; Supp, §245A-5; HRS §662-5; am L 1979, c 152, §2]

§662-6 Pleadings, trial and appeal. The Hawaii Rules of Civil Procedure and the District Court Rules of Civil Procedure as applicable shall be followed in any action under this chapter. A certified copy of all pleadings shall be duly served on the attorney general.

Sections 661-2 and 661-9 shall apply to actions under this chapter. [L 1957, c 312, pt of §1; Supp, §245A-6; HRS §662-6; am L 1972, c 164, §2(b); am L 1978, c 156, §3]

§662-7 Attorney general. The State shall be represented by the attorney general of the State in all actions under this chapter. [L 1957, c 312, pt of §1; Supp, §245A-7; HRS §662-7]

§662-8 Interest. On all final judgments rendered against the State in actions instituted under this chapter, interest shall be computed at the rate of four per cent a year from the date of judgment up to, but not exceeding, thirty days after the date of approval of any appropriation act providing for payment of the judgment. [L 1957, c 312, pt of §1; Supp, §245A-8; HRS §662-8]

§662-9 Costs. In an action under this chapter, court costs and fees as set by law may be allowed to the prevailing party. [L 1957, c 312, pt of §1; Supp, §245A-9; HRS §662-9; am L 1972, c 164, §2(c); am L 1979, c 152, §3]

§662-10 Judgment as bar. The judgment in an action under this chapter shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the State whose act or omission gave rise to the claim. [L 1957, c 312, pt of §1; Supp, §245A-10; HRS §662-10]

§662-11 Compromise. The attorney general, with the approval of the court, may arbitrate, compromise, or settle any claim cognizable under this chapter, after commencement of an action thereon; provided that the attorney general may arbitrate, compromise, or settle claims for $2,000 or less without the necessity of court approval or the commencement of an action. The attorney general shall prepare, for each fiscal year, a report of all claims arbitrated, compromised, or settled for $2,000 or less. The report shall be submitted to the legislature twenty days prior to the commencement of the regular session next succeeding the year for which the report is made. [L 1957, c 312, pt of §1; Supp, §245A-11; am L 1967, c 232, §1; HRS §662-11]

§662-12 Attorney's fees. The court rendering a judgment for the plaintiff pursuant to this chapter or the attorney general making a disposition pursuant to section 662-11 may, as a part of such judgment, award, or settlement, determine and allow reasonable attorney's fees which shall not, however, exceed twenty-five per cent of the amount recovered and shall be payable out of the judgment awarded to the plaintiff; provided that such limitation shall not include attorney's fees and costs that the court may award the plaintiff as a matter of its sanctions. [L 1957, c 312, pt of §1; Supp, §245A-12; HRS §662-12; am L 1979, c 152, §4]

§662-13 No awards except upon legal evidence. In no case shall any liability be implied against the State, and no award shall be made against the State except upon such legal evidence as would establish liability against an individual or corporation. [L 1957, c 312, pt of §1; Supp, §245A-13; HRS §662-13]

§662-14 Exclusiveness of remedy. The authority of the State or any state agency to sue and be sued in its own name shall not be construed to authorize any other actions against the State or such agency on claims for torts of its employees, and the rights and remedies provided by this chapter and section 661-11 shall be exclusive. [L 1957, c 312, pt of §1; Supp, §245A-14; HRS §662-14; am L 1972, c 164, §2(d)]

§662-15 Exceptions. This chapter shall not apply to:

(1) Any claim based upon an act or omission of an employee of the State, exercising due care, in the execution of a statute or regulation whether or not such statute or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved has been abused;

(2) Any claim arising in respect of the assessment or collection of any tax, or the detention of any goods or merchandise by law enforcement officers;

(3) Any claim for which a remedy is provided elsewhere in the laws of the State;

(4) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel,

slander, misrepresentation, deceit, or interference with contract rights;

(5) Any claim arising out of the combatant activities of the Hawaii national guard and Hawaii state guard during time of war;

(6) Any claim arising in a foreign country;

(7) Any claim arising out of the acts or omissions of any boating enforcement officer appointed under section 267-6. [L 1957, c 312, pt of §1; Supp, §245A-15; HRS §662-15; am L 1972, c 164, §2(e); am L 1979, c 195, §2]

§662-16 Defense of state employees. The attorney general may defend any civil action or proceeding brought in any court against any employee of the State for damage to property or for personal injury, including death, resulting from the act or omission of any state employee while acting within the scope of his employment. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the attorney general, all process or complaint served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the department of the attorney general.

No judgment by default shall be entered against a state employee based on a cause of action arising out of an act or omission of such employee while acting within the scope of his employment unless the department of the attorney general has received a copy of the complaint or

other relevant pleadings and a period of twenty days has elapsed from the date of such receipt. [L 1976, c 47, §1]

Medicaid Providers' Manual

M. PSYCHIATRIC SERVICES

* * *

A psychiatric outpatient visit is defined as "a personal contact between the patient and a psychiatrist or a member of the therapeutic team for treatment or diagnostic purpose."

EXHIBIT I

AGREEMENT BETWEEN THE DEPARTMENT OF SOCIAL SERVICES AND HOUSING AND THE DEPARTMENT OF THE ATTORNEY GENERAL

This Agreement between the DEPARTMENT OF SOCIAL SERVICES AND HOUSING, hereinafter referred to as "DEPARTMENT and the DEPARTMENT OF THE ATTORNEY GENERAL, hereinafter referred to as "ATTORNEY GENERAL", is made on the 12th day of May, 1978.

WHEREAS, the DEPARTMENT and the ATTORNEY GENERAL are desirous of protecting the preserving the integrity of the Medicaid Program in its expenditures of public funds; and

WHEREAS, the most effective protection of the Medicaid Program will result from a cooperative effort by the DEPARTMENT and the ATTORNEY GENERAL wherein each will furnish information and expertise in its respective field; and

WHEREAS, there has been established within the Department of the Attorney General, a State Medicaid Fraud Unit, hereinafter referred to as "Unit", to investigate and prosecute those persons responsible for fraud in the State Medicaid Program and abuse or neglect of patients in health care facilities receiving payments under the Medicaid plan.

THEREFORE, in consideration of the mutual benefits and promises contained herein the Agencies agree:

1. The DEPARTMENT will conduct a preliminary investigation of suspected cases of fraud by providers or abuse or neglect of patients in health are facilities receiving Medicaid funds; it will refer to the Unit all cases in which the investigation indicates that potential fraud or abuse of a criminal nature does exist.

The Unit will investigate all cases involving potential fraud referred by the DEPARTMENT and take such action as in its discretion it deems warranted. If the investigation indicates abuse which does not warrant a criminal fraud action, it will refer the case back to the DEPARTMENT with recommendations for action. The DEPARTMENT shall take such action as is warranted and advise the Unit of the resolution of the case;

The Unit will review all complaints of abuse or neglect of patients in health care facilities receiving payments under the Medicaid plan. If the review indicates substantial potential for criminal prosecution, the Unit will investigate the complaint and take such action as it deems warranted; if the initial review does not indicate an investigation is warranted, the Unit will refer the complaint to the appropriate Department with recommendations for action. The DEPARTMENT will make such action as is warranted and will notify the Unit of the resolution of the complaint;

2. The DEPARTMENT will comply promptly with a request from the Unit for access to, and free copies of any records of information within the possession of the agency or its contractors that may be useful to the Unit in carrying out its responsibilities;

3. The DEPARTMENT will comply promptly, without charge, with a request from the Unit for computerized data stored by the DEPARTMENT or its contractors in such form as the Unit may request;

4. The DEPARTMENT will arrange for the Unit to have access to any records or information kept by a provider of services under the State Medicaid Plan to which the DEPARTMENT is authorized access.

5. Legal actions for the recovery of overpayment made under the Medicaid plan and discovered by the Unit in carrying out its responsibilities will be handled by the Unit; on referral the DEPARTMENT will initiate administrative actions to recover sums identified by the Unit as improperly paid to a provider; the DEPARTMENT will give due consideration to a request by the Unit to suspend payments or to offset sums due a provider against sums believed to be improperly paid;

6. The DEPARTMENT will take its personnel and its contractors, together with appropriate documentation, available without charge for consultation and as witnesses for such judicial or administrative proceedings as the Unit may pursue.

It is understood that the Unit operates as an independent function of the ATTORNEY GENERAL and its actions are not subject to review or control by the DEPARTMENT.

In using records or information the AGENCIES agree to protect the privacy rights of the patients in accordance

with the applicable law and maintain the records or information in confidential files.

DEPARTMENT OF SOCIAL SERVICES AND HOUSING,

By /s/ Andrew Chang
Director

DEPARTMENT OF THE ATTORNEY GENERAL,

By /s/ Ronald T. Arinaga
Attorney General

Return to:
Dept. of Social Services & Houses
Public Welfare Division
Medical Care Administration Service
P. O. Box 339
Honolulu, HI 96809

STATE OF HAWAII
DEPARTMENT OF SOCIAL SERVICES AND HOUSING

APPLICATION TO PARTICIPATE AS A PROVIDER OF SERVICE IN THE HAWAII STATE MEDICAID PROGRAM

We/I, (Print Name of Applicant) Carol A. Brown M.D. hereby apply for a provider number under which we/I may provide service to persons determined to be eligible for benefits under the Medicaid Program.

We/I am licensed by the State of Hawaii as a Medical Doctor. For physician providers (type of service) Psychiatric. Certified by a specialty board? Yes ___: No X. License Number 3373 (Hawaii) and date of issuance June 19, 1978.

We/I agree to abide by the provisions of Title VI of the Civil Rights Act of 1964 and will not discriminate against any program beneficiary on the basis of race, color, or national origin.

We/I agree to keep such records as are necessary to disclose fully the extent of care and/or services provided to eligible persons and to furnish the Department of Social Services and Housing such information from those records regarding any payments that have been claimed under the program as the Department may require.

We/I agree to accept payments based on the Department's established rates of reimbursement as payment in full for care of services rendered.

We are/I am aware that it is a violation of Federal Law to accept additional payments over and beyond those established by the Department for services rendered under the Medicaid Program.

The undersigned understands and agrees that proof of any of the causes listed in the Public Welfare Policy Manual Section 3466 will result in suspension or termination of participation as a provider of service in the Medicaid Program.

We/I agree that all services that we/I claim against the Medicaid Program (Title XIX) will be personally rendered by me.

July 20, 1978
Date Signed

/s/ Carol A. Brown M.D.
Print Name of Authorized Personnel and Title

Effective Data

/s/ Carol A. Brown M.D.
Signature

374-4621(O) 946-8558(H)
Telephone Number

AINA HAINA Prof. BLDG. • 224
350 West Hind Dr. Hon. Hi. 96821
Business Address / City / State / Zip Code

DO NOT WRITE BELOW THIS LINE:
OFFICIAL USE ONLY

7/27/78
Suite Approved

Classification: ___

/s/ Ron Miller
Material Care, Administrate

Provider Number: ___

A notice to new applicants and a reminder to established Medicaid providers is hereby, given that in accordance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 70b), and the regulations issued thereunder by the Department of Health, Education and Welfare (45 CFR Parts 80 and 84), no individual shall, on the ground of race, color, national origin, or handicap be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under this program. Complaints of discrimination by all beneficiaries of the Medicaid Program may be directed to the Department of Social Services and Housing, Medical Care Administration Service, P. O. Box 339, Honolulu, Hawaii 96809.

PUBLIC WELFARE DIVISION
ASSURANCE OF COMPLIANCE AGREEMENT

Carol A. Brown M.D. Inc. (hereinafter referred to as the service provider) HEREBY AGREES THAT it will comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352), Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112), Age Discrimination Act of 1975 (P.L. 94-135) and all the requirements issued pursuant to the respective

title, section and/or act, as promulgated by the regulations of the Department of Health and Human Services and HEREBY GIVES ASSURANCE THAT it will immediately take any measures necessary to enact this agreement, to the effect that no person shall on the ground of the applicable categories such as race, color, national origin, sex, age or handicap, be excluded from participation in, be denied the benefits of, or by otherwise subjected to discrimination under any program and/or activity of the service provider that is funded in its entirety or in part directly or indirectly by Federal financial assistance.

If any real property or structure thereon is provided or improved either directly or indirectly by Federal financial assistance from the Department of Health and Human Services, this assurance shall obligate the service provider, or in the case of any transfer of such property, any transferee, for the period during which the real property or structure is used for a purpose for which the Federal financial assistance is extended of for another purpose involving the provision of similar services and/or benefits. If any personal property is so provided, this assurance shall obligate the service provider for the period which it retains ownership or possession of the property. In all other cases this assurance shall obligate the service provider for the period during which the Federal financial assistance is extended to it either directly of indirectly by the Department of Health and Human Services.

THIS ASSURANCE is given by the service provider in consideration of and for the purpose of receiving or benefiting from either directly or indirectly any and/or all Federal financial assistance that is extended after the

date hereof by the Department of Health and Human Services, through the State of Hawaii Department of Social Services and Housing. The service provider recognizes and agrees that such Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States and/or the State of Hawaii shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the service provider, its successors, transferees and assignees, and to the person or persons authorized to sign this assurance on behalf of the service provider whose signatures appear below.

Dated November 2, 1981

/s/ Carol A. Brown M.D. Inc
(Applicant)
By /s/ Carol A. Brown M.D.
President, or authorized official

Ph. (308) 521-4013
1314 So King St. Suite #609
Applicant's mailing address and phone no.)
Honolulu Hawaii 76314

R. STEVEN GESHELL, 3349
Suite 1222, Executive Centre
1088 Bishop Street
Honolulu, Hawaii 96813
Tel. No. 808/545-5750

Attorney for Plaintiff
Carol A. Brown, M.D.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CAROL A. BROWN, M.D., Plaintiff, vs. DONALD WONG; CLYDE VIERRA; FRANKLIN Y. K. SUNN; EARL MOTOOKA; THE STATE OF HAWAII; DEPARTMENT OF HUMAN SERVICES, formerly the Department of Social Services and Housing of the State of Hawaii; JOHN DOES 1 through 10; JOE CORPORATIONS 1 through 10; and DOE UNINCORPORATED ASSOCIATIONS, INCLUDING PARTNERSHIPS 1 through 10, Defendants.	CIVIL NO. 88-2370-07 COMPLAINT; DEMAND FOR JURY TRIAL; SUMMONS (Filed July 29, 1988)

COMPLAINT

COMES NOW Plaintiff, and for Complaint against the Defendant, alleges:

COUNT I – INFLICTION OF EMOTIONAL DISTRESS

1. Plaintiff is a resident of the City and County of Honolulu, State of Hawaii, and at all times herein relevant was and is a licensed and practicing psychiatrist in the State of Hawaii.

2. Donald Wong is a resident the City and County of Honolulu, State of Hawaii, and at all times herein alleged was an investigator for the State of Hawaii Medicaid Fraud Control Unit, operating under the Attorney General of the State of Hawaii. Defendant Chambers is sued individually and is an investigator for the State of Hawaii.

2. Clyde Vierra is a resident of the City and County of Honolulu, State of Hawaii, and at all times herein alleged was an investigator for the State of Hawaii Medicaid Fraud Control Unit, operating under the Attorney General of the State of Hawaii. Defendant Vierra is sued individually and is an investigator for the State of Hawaii.

4. Franklin Y. K. Sunn is a resident of the City and County of Honolulu, State of Hawaii, and at all times herein alleged was the Director of DHS, formerly DSSH, and was at said times responsible for administering Medicaid programs in the State of Hawaii. Mr. Sunn is liable individually and in his capacity as Director of DHS.

5. That Earl Motooka is a resident of the City and County of Honolulu, State of Hawaii, and at all times herein alleged and relevant was the Administrator of the Health Care Administration Division of the DHS, formerly DSSH. That Mr. Motooka at all times relevant herein was directly responsible for state administration of

the Medicaid program in Hawaii. Mr. Motooka is sued individually and as Administrator of Health Care for DHS.

6. The State of Hawaii is a state of the United States of America and will hereinafter be referred to as "State". The State is subject to tort liability by HRS § 662-1 *et seq.*, and contract liability by HRS § 661-1 *et seq.*

7. The Department of Human Services is a state agency under the laws of the State of Hawaii and was formerly called the Department of Social Services and Housing. The said Department of Human Services, hereinafter referred to as "DHS", at all times herein alleged was responsible for administering the Medicaid program in the State of Hawaii. DHS is subject to tort liability by HRS § 662-1 *et seq.*, and contract liability by HRS § 661- *et seq.*

8. John Does 1 through 10, Doe Corporations 1 through 10, and Doe Unincorporated Associations, including Partnerships 1 through 10, are either individuals, partnerships, corporations, or government entities, and are designated as such herein, are presently unknown persons, business entities, partnerships, corporations, and government entities and are being sued under fictitious names for the reason that their true names and identities are unknown to the Plaintiff, but that they were in some way responsible for the events hereinafter referred to and that their acts, conduct and/or omissions directly and proximately caused the injuries and damages to the Plaintiff as hereinafter alleged. That Plaintiff's attorney has made a diligent search of business records and other

evidence to ascertain their true names and identities but has been unable to do so.

9. That the Defendants have inflicted severe emotional distress and anxiety upon the Plaintiff, either negligently or intentionally, by the following extreme, malicious and outrageous conduct as follows:

A. Between November 4, 1985 and September of 1986, Defendants Wong and Vierra, under the guise of conducting an investigation of claimed Medicaid fraud, contacted over 100 of her patients and obtained statements from 13 of the Plaintiff's sickest patients, allegedly accusing the Plaintiff of overcharging the State of Hawaii Medicaid program for their care. Defendant Wong further testified before the Grand Jury in September of 1986 about two such patients' testimony, which was completely contrary to the real facts and the testimony that the patients would have given had they been called to testify before the Grand Jury.

B. That Defendants Wong and Vierra, by obtaining the Plaintiff's patient records, invaded the physician-patient privilege and exposed the patients' confidential treatment files to scrutiny by the State Medicaid Fraud Unit.

C. The Defendants did not give Plaintiff any notice that she was under investigation in violation of the federal regulations found in 42 C.F.R. § 455.12 through .21.

D. That the Defendants State and DHS operated the Medicaid program using vague and ambiguous regulations by which to snare unsuspecting psychiatric providers without clearly defining the term "psychotherapy" in modern terminology and concept, thereby infringing the Plaintiff's Fourteenth Amendment due process and equal protection rights.

E. Defendants State and DHS used illegally-adopted rules through HMSA to administer the Medicaid program and upon which claimed violations of the state law were based, in that said regulations were not adopted according to HRS § 91-3 and -4.

F. The State and DHS failed to adopt a 1983 psychiatric health care providers' manual so that psychiatrists could know what procedures and therapy were covered compensible and and what service was expected of them for procedure codes.

G. The State and DHS failed to adopt proper regulations as required by 42 C.F.R. § 455.12 through .21 for establishing criteria for identifying suspected fraud cases and methods of investigating those cases which do not infringe on the legal rights of the persons involved and afford due process.

H. Defendants selectively prosecuted the Plaintiff as a female, caucasian psychiatrist, thus constituting sexual and racial discrimination in violation of 42 U.S.C. § 2000d.

I. All Defendants investigated and prosecuted the Plaintiff without any patient complaint, but upon Plaintiff's information and belief she was prosecuted as a then, State employee who was highly critical of the excessive cost of constructing a new state hospital, thus precipitating a means to terminate her criticism and cause her to be disqualified as a Medicaid provider.

J. That Defendants Wong and Vierra, in conducting the investigation without a complaint by any of Plaintiff's patients, engaged in outrageous conduct by contacting the Plaintiff's patients to encourage them to testify against the Plaintiff, when they knew or should have known that these patients were emotionally

unstable and potentially incompetent witnesses and that they had an authoritative position over them to obtain their cooperation to testify and to accuse the Plaintiff of overcharging the State for her time spent with them in psychiatric care.

K. Additionally, Defendants Wong and Vierra conspired with a local attorney to encourage the Plaintiff to resolve the criminal prosecution by pleading guilty to one count of theft and all 134 counts would be dropped, thereby depriving the Plaintiff of her right to counsel and right to trial guaranteed by the Sixth Amendment to the United States Constitution and in violation of 42 U.S.C. § 1985(2), by denying her equal protection of the laws to vindicate her name and establish her innocence.

L. Defendants used computer analysis for their fraud detection scheme rather than patient complaint.

10. That Defendants Vierra and Wong acted with malice and not for an otherwise proper purpose, all of which is imputed to the employer, the State, under *respondeat superior.*

11. That as a direct and proximate result of the acts of the Defendants as aforesaid, the Plaintiff has been damaged as follows:

A. Special damages to date of $55,000.00 for attorney's fees incurred in the defense of her criminal case, for which she was acquitted.

B. Special damages loss of income to date in the sum of $100,000.00.

C. General damages in an amount to be proven at trial for invasion of her privacy, embarrassment, annoyance, severe emotional distress, loss of present and future earning capacity, ridicule,

being avoided and shunned by others, loss of reputation, worry and inconvenience.

D. Punitive damages in an amount to be proven at trial.

COUNT II – BREACH OF CONTRACTS

1. Plaintiff realleges Paragraphs 1 through 10 of Count I and makes them a part hereof by reference.

11. Defendants State and DHS contracted with the Plaintiff, as a Medicaid health care provider, in which the State and DHS expressly and impliedly agreed to properly administer the Medicaid program in Hawaii as per the state and federal statutes and regulation and the Medicaid Provider's Manual furnished by the State and DHS. That said Medicaid Provider's Manual constituted part of the agreement between the Plaintiff and Defendants DHS and State, required Defendant Motooka to conduct preliminary investigations of alleged violations by the provider before investigation is referred to the Attorney General's Office, and further that no provider will be suspended or terminated or legal action taken until after an administrative hearing with due process being afforded the provider.

12. The State of Hawaii contracted with the United States of American to administer a federally funded medical assistance program known as Medicaid in the State of Hawaii, which program was to be administered by the Department of Social Services and Housing, now DHS, during the years 1985 to the present.

13. In connection with that agreement, the State agreed to abide by the federal regulations concerning the administration of the Medicaid program in the State of Hawaii. According to 42 C.F.R. § 455.12 through .21, the DHS must have methods of criteria for identifying suspected fraud cases and methods for investigating those cases which do not infringe on the legal rights of the persons involved and afford due process of law.

14. The Defendants State and DHS have breached the aforesaid agreements in the following respects:

A. In failing to adopt methods and criteria for identifying suspected fraud cases and methods for investigating these cases that do not infringe on the legal rights of the persons involved and yet afford due process of law.

B. In failing to adopt rules and regulations under the Administrative Procedures Act, HRS § 91-3 & -4, to define with particularity what types of psychotherapy treatment, both in-patient and out-patient, are compensable under the Medicaid Program in the State of Hawaii.

C. In failing to administer the program in a reasonable fashion so that health care providers and, in particular, psychiatrists such as the Plaintiff, would be able to know what psychotherapy treatment is compensable and what is not under the regulations and interpretation thereof.

D. By adopting vague and ambiguous regulations or rules through HMSA, which is not a state agency and in violation of HRS § 91-3 and -4.

E. In failing to adopt a 1983 psychiatric health care providers' manual.

F. In failing to notify the Plaintiff that she was under investigation before the investigators contacted her patients and examined her records without a search warrant and engaged in their outrageous conduct.

G. In failing to properly supervise the Medicaid Fraud Unit by not following federal regulations regarding audits and investigations, as required by 42 C.F.R. § 455.300(e) and (f), 42 C.F.R. § 1002.319, and others.

H. In failing to warn the Plaintiff she would be investigated for Medicaid fraud if she saw too many patients and, thus, exceeded the computer guidelines for such claims.

I. In failing to comply with the Medicaid Provider Manual investigation, notification, and legal action requirements contained in Chapter I of said manual with respect to Plaintiff before she was investigated by the Medicaid Fraud Control Unit and Defendants Vierra and Chambers.

15. The Plaintiff was and is a third-party beneficiary to the agreement between the United States and the State by virtue of being a health care provider duly qualified and acting as such under the Medicaid program since 1981.

16. As a direct and proximate result of the breaches of said agreements by the State of Hawaii and the DHS as aforesaid, the Plaintiff was subjected to a Medicaid fraud investigation in which her patients were questioned about her services. That if the State had not breached said agreements, Plaintiff would not have been so investigated.

17. As a direct and proximate result of the breaches of said contracts, the Plaintiff has been damaged as follows:

A. Special damages to date as follows:

(1) Attorney's fees and expenses of $55,000.00.

(2) Loss of income to date of $100,000.00.

B. General damages in an amount to be proven at trial consisting of the following:

(1) Loss of future earning capacity.

(2) Loss of reputation in the community.

(3) Embarrassment.

(4) Severe emotional distress, worry and inconvenience.

(5) Invasion of privacy.

18. Plaintiff is also entitled to reasonable attorney's fees as provided in 42 U.S.C. § 1988 and HRS § 607-14.

COUNT III – NEGLIGENT ADMINISTRATION OF MEDICAID

1. Plaintiff realleges Paragraphs 1 through 10 of Count I and makes them a part hereof by reference.

11. Defendants State and DHS are subject to liability to the Plaintiff by virtue of HRS § 662-1, *et seq.* and *respondeat superior.*

12. Defendants Sunn and Motooka, at all times relevant herein, had the duty of administering the Medicaid program in the State of Hawaii and have had such duty at least since 1983.

13. That the Defendants Sunn, Motooka, State and DHS were negligent in 1986 through 1987 in connection with performing their duty in administering the Medicaid program in the State of Hawaii in the following respects:

A. In failing to adopt methods and criteria for identifying suspected fraud cases and methods for investigating these cases that do not infringe on the legal rights of the persons involved and yet afford due process of law.

B. In failing to adopt rules and regulations under the Administrative Procedures Act, HRS § 91-3 & -4, to define with particularity what types of psychotherapy treatment, both in-patient and out-patient, are compensable under the Medicaid program in the State of Hawaii.

C. In failing to administer the program in a reasonable fashion so that health care providers and, in particular, psychiatrists such as the Plaintiff, would be able to know what psychotherapy treatment is compensable and what is not under the regulations and interpretation thereof.

D. By adopting vague and ambiguous regulations or rules through HMSA, which is not a state agency and in violation of HRS § 91-3 and -4.

E. In failing to adopt a 1983 psychiatric health care providers' manual.

F. In failing to notify the Plaintiff that she was under investigation before the investigators contacted her patients and examined her records without a search warrant and engaged in their outrageous conduct.

G. In failing to properly supervise the Medicaid Fraud Unit by not following federal regulations regarding audits and investigations, as required by 42 C.F.R. § 455.300(e) and (f), 42 C.F.R. § 1002.319, and others.

H. In failing to warn the Plaintiff she would be investigated for Medicaid fraud if she saw only

patients in a hospital as opposed to both in-patient and out-patient treatment.

I. In failing to comply with the Medicaid Provider Manual investigation, notification, and legal action requirements contained in Chapter I of said manual with respect to Plaintiff before she was investigated by the Medicaid Fraud Control Unit and Defendants Vierra and Chambers.

14. As a direct and proximate result of the negligence of the Defendants Sunn, Motooka, State and DHS, Plaintiff has been damaged in the following respects:

A. Special damages to date as follows:

(1) Attorney's fees and expenses of $55,000.00.

(2) Loss of income to date of $100,000.00.

B. General damages in an amount to be proven at trial consisting of the following:

(1) Loss of future earning capacity.

(2) Loss of reputation in the community.

(3) Embarrassment.

(4) Severe emotional distress, worry and inconvenience.

(5) Invasion of privacy.

15. Plaintiff is entitled to reasonable attorney's fees as provided in 42 U.S.C. § 1988, because the breach of the duty owed to the Plaintiff constituted a deprivation of the Plaintiff's rights, privileges or immunities secured by the Constitution and laws, as per 42 U.S.C. § 1983.

COUNT IV – INVASION OF PRIVACY

1. Plaintiff realleges Counts I through III and makes them a part hereof by reference.

2. Defendants, by their acts alleged in Counts I through III, invaded the privacy of the Plaintiff in the following respects:

A. By unreasonably intruding upon the seclusion of the Plaintiff by harrassing her, her patients, some medical personnel, and scrutinizing her files.

B. By unreasonably subjecting her professional life to publicity which would be highly offensive to reasonable persons and was not a ligitimate concern to the public.

C. In placing the Plaintiff in a false light in the public eye which would be highly offensive to a reasonable person, when the Defendants had knowledge of or acted in reckless disregard of the falsity of the publicized matter and the false light in which others would place it.

3. That the Defendants acted maliciously and without proper purpose and in wanton disregard of the rights of the Plaintiff.

4. That as a direct and proximate result of the invasion of the Plaintiff's privacy, the Plaintiff was damaged as alleged in Paragraph 11 in Count I, which is incorporated herein.

COUNT V – TORTIOUS INTERFERENCE WITH CONTRACTS

1. Plaintiff realleges Counts I through IV and makes them a part hereof by reference.

2. That the acts of the Defendants collectively alleged in Counts I through IV have interfered with and had a detrimental impact upon the Plaintiff's business as a psychiatrist in the City and County of Honolulu, State of Hawaii, thereby causing her to lose business and reputation in this community.

3. That the Defendants knew or should have known that their conduct would interfere with the Plaintiff's business relationships in the practice of her profession in the City and County of Honolulu, State of Hawaii, and in any other state in which she may practice her profession.

4. Alternatively, the acts of the Defendants were intentional in interfering with her business relationship and profession.

5. That the Defendants were not privileged nor justified in so acting to interfere with the Plaintiff's business. That by virtue thereof, Defendants acted maliciously and without proper purpose.

6. That as a direct and proximate result thereof, Plaintiff has been damaged as alleged in Paragraph 11 of Count I, which is incorporated herein.

COUNT VI – CIVIL RIGHTS VIOLATIONS

1. Plaintiff realleges Counts I through V and makes them a part hereof by reference.

2. That the acts of the Defendants collectively alleged in Counts I through V, operating under color of state law of the State of Hawaii violated 42 U.S.C. § 1983 by depriving the Plaintiff of her constitutional rights, privileges and immunities secured by the United States Constitution and

laws, including, but not limited to, the Fourth Amendment, the Sixth Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the physician-patient privilege, the Contract Clause (Article I, Section 10) of the United States Constitution, federal and state regulations concerning administration of Medicaid, the Administrative Procedures Act in HRS § 91-3 and -4, et seq.

3. That the Defendants were not privileged nor justified in so acting to deprive Plaintiff of her civil rights. That by virtue thereof, Defendants acted maliciously and without proper purpose.

4. That as a direct and proximate result thereof, Plaintiff has been damaged as alleged in Paragraph 11 of Count I, which is incorporated herein.

5. That Plaintiff is entitled to reasonable attorney's fees as provided in 42 U.S.C. § 1988.

WHEREFORE, Plaintiff prays for judgment against the Defendants for special damages, general damages, and punitive damages in amounts to be proven at trial within the minimum jurisdictional limits of this Court, together with reasonable attorney's fees, plus pre- and post-judgment interest at the legal rate.

DATED: Honolulu, Hawaii, this 29 day of July, 1988.

/s/ R. Steven Geshell
R. STEVEN GESHELL
Attorney for Plaintiff
Carol A. Brown, M.D.

DEMAND FOR JURY TRIAL

Plaintiff requests jury trial on all counts herein.

/s/ R. Steven Geshell
R. STEVEN GESHELL
Attorney for Plaintiff
Carol A. Brown, M.D.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII	)	CR. NO. 86-1082
VS.	)	
CAROL A. BROWN, M.D.,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

had before the HONORABLE WILFRED K. WATANABE, Tenth Judge, presiding, on Thursday, March 19, 1987, at Honolulu, Hawaii, in the above-entitled matter; a jury-waived trial.

APPEARANCES: MR. PETER YEE, Deputy Attorney General For the State of Hawaii

MR. R. STEVEN GESHELL
For the Defendant

Reported by:

GRACE K. WADA, CSR-197
Official Court Reporter

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(p. 59) Q Well, now, let's talk about inpatient care, first off. Do you think that that definition still covers the reimbursable portion of the Medicaid provisions for face-to-face contact?

A No.

Q You're clear about that?

A Yes.

Q No doubt in your mind?

A Yes.

Q And so on inpatient care, the doctor need not be present and still be entitled to recover for a fifty minute psychotherapy session.

A Well, I wouldn't say that the doctor need not be present.

Q Well, he's not face to face.

A Well, they could be conversing or discussing the case with nurses or family, not face to face with the patient.

Q Can you show that to me in the regulations where it says that?

A No. There is nothing in our regulations that says that.

Q Okay. Now, I'm talking about the ones that are over in the Lieutenant Governor's office; right?

A Un-huh.

(p. 60) Q Is that right?

A I believe so.

Q And your memos and your newsletters and your communications to the physicians – they're not over there – they're not in the Lieutenant Governor's office, are they?

A I don't know.

Q Well, who would know in your office?

A I don't know.

Q Well, aren't you the psychiatric consultant for the state?

A Yes, I am.

Q Aren't you the head of the department there?

A No, I'm not head of the Department of Social Services.

Q Oh. What do you do, then?

A I mentioned that earlier, that I am a psychiatric consultant.

Q Well, are you the one that generates these memoranda that tell the doctors what is in and what is out?

A No.

Q Who does that?

A HMSA.

Q HMSA generates those.

A (Nods head.)

Q Do you have any say-so as to what goes into (p. 61) those things?

A Yes, we do.

Q You personally?

A Yes.

Q So HMSA generates these newsletters and those kinds of things; is that right?

A They publish it with input from the Department of Social Services and Housing.

Q Well, would you be surprised to know that the lady from HMSA said that you folks generate those and they publish them?

A Well, –

THE COURT: She didn't testify to that, Mr. Geshell.

A I guess in my mind, it's a question of what do you mean by "generate."

Q (By Mr. Geshell) Well, do you tell them what to put in there?

A We submit things we would like to have published, and sometimes they are edited and it's not necessarily verbatim as to how we asked them to publish it.

Q And are those newsletters – are they adopted pursuant to the Administrative Procedures Act?

A Well, I don't know how to answer your question, but I would say that whatever instruction we give to HMSA (p. 62) to publish are based on HRS and CPT.

Q Do you have hearings with the doctors in which you disseminate to them what it is that you're going to publish so that they can come in and have a hearing on that and describe to you what the real world is about what happens out in the psychiatric care field?

MR. YEE: Your Honor, we went through that with some degree of detail, with Mrs. Takano. I don't believe it's relevant here.

MR. GESHELL: Well, I think it's quite relevant, Your Honor. This man has indicated that he's familiar with all of these things, and he's given his opinion as to his construction of it, and I want to find out how he arrived at that and what in fact, what they do.

THE COURT: That wasn't your question, though.

MR. GESHELL: Well, this all goes to that part of it, Your Honor.

THE COURT: You're talking as if they're required to have these newsletters and memos go through the public hearing process, and I don't think that's required at all.

MR. GESHELL: Well, they're acting like this is the law, Your Honor. And if they are, if that's what the doctors are required to follow, then it better follow the Administrative Procedures Act, the way we construe that. (p. 63) And I'm just establishing exactly that – they have not.

THE COURT: Okay. Overruled.

A When there are changes made to the regulations, the changes have to go to public hearing. That's part of the Administrative Procedures Act, and which we do.

Q (By Mr. Geshell) All right. Did you publish the 1983 physicians' manual?

A We, the department, didn't publish it per se. HMSA published it.

Q And was there a public hearing on that?

A I don't know what happened at that time.

Q Okay. You just know what happened after 1965, July 1, '85.

A Uh-huh.

Q Is that correct?

A Correct.

Q All right. How about the 1983 psychiatric health care providers' manual? Has that ever been published?

A I'm not familiar with what you're referring to.

Q Well, would you have one in your office if it had been?

MR. YEE: Well, Your Honor, it's been established by Mrs. Takano that a 1983 psychiatric providers' manual was not published.

(p. 64) MR. GESHELL: She didn't know, as I recall.

THE COURT: Objection sustained.

MR. GESHELL: Okay.

Q (By Mr. Geshell) Now, you say that hypnotic therapy and biofeedback are not compensable under your analysis of the rules.

A That's correct.

Q Now, which rules are you referring to?

A The ones that are published and in the, what you refer to as, the Lieutenant Governor's office.

Q In that?

A Yes.

Q Okay. I had you Exhibits N and O. You ever seen those before?

A Uh-huh.

Q Can you find that specifically in there, please.

A Uh-huh.

Q And refer to which exhibit you're talking about.

A 17-749-15.

Q 17-149?

A No. 17-749-15. Paragraph C, No. 5. Hypnosis is considered as something that is excluded. Marriage therapy is also there.

(p. 65) Q Now, what exhibit are you referring to?

A Title 17, DSSH, Subchapter (16), Public Welfare, Chapter 749.

Q Is that Exhibit N?

A Yes.

Q Do you find in that section an exclusion for phone calls?

A No.

Q Where do you find the exclusion in the regulations for phone calls?

A To my knowledge, there is no exclusion for it; and on the other hand, there is nothing in our regulations that says phone calls are reimbursable.

Q So you're saying that your interpretation is since it's not listed as an exclusion and since it's not an inclusion, it's therefore out, not compensable.

A That's not included as something that we pay for.

Q Where does it says that in the regulations, doctor?

A To my knowledge, it doesn't appear anywhere in the regulations.

Q So who determines that?

A We would pay for the things that we approve of and are listed in the regulations. It's not listed, so (p. 66) it's not paid.

Q You mean to tell me, Doctor Chun, that if a psychiatrist had a patient come in the office for thirty minutes and later that day the patient called out or called the doctor while she was at the hospital, say, "I'm going to jump off the ledge of this building, commit suicide," and the doctor then talked with the patient on the phone and talked the patient out of doing that, for thirty minutes, that that would not be compensable under these regulations?

A At this time, yes.

Q That's your understanding of it.

A Yes.

Q Because why?

A There is no psychotherapy that was involved.

Q So that saving of that patient's life was not compensable.

A I wouldn't put it that way. I would say that there was no psychotherapy provided in an office or in an emergency room, and it is not covered by our program.

Q Would you agree that that's an absurd result?

A Well, I don't know that I'll agree that it's absurd.

Q Now, I believe you said that paperwork and patient charts are not compensable the way you understand (p. 67) it under the regulations on an outpatient basis.

A Well, I don't recall saying that, but if the record reflects that, then that's what it says.

Q Well, let's just ask you, then. What is your opinion about that?

A About paperwork and phone calls?

Q Well, no. Charts. You said – You were asked about this, reviewing patient charts, doing paperwork on an outpatient basis. And under your understanding of the regulations, does that come within the term "psychotherapy"?

A Generally speaking, psychiatrists will include and complete their paperwork within the hour that they are being compensated for.

Q Well, does it say that in the regulation?

A No.

Q Well, then, on an inpatient basis, what about when the doctor comes in and makes charts and reviews charts, makes notes on them, orders medication and does all that paperwork, reviews and talks with the staff? Is that all compensable under your understanding of the regulations?

A For inpatients, yes.

Q All right. But on outpatient basis, do you say that the paperwork would ordinarily be done in the presence (p. 68) of the patient and, therefore, is compensable?

A Not necessarily in the presence of the patient.

Q Well, if it was done in the presence of the patient, would that be compensable?

A Well, whether the patient is present or not in my mind is not the critical issue.

Q But you said the psychotherapy must be one of one, face to face.

A That's correct.

Q Well, so that is the conclusion, then, about that? Is that paperwork done out of the presence of the patient, whether you're reviewing charts, the patient's chart in preparation for the therapy and when you're making phone calls to other doctors to find out other information or find out what medication the patient is on and to review the medication dosages that you prescribed two weeks before that you couldn't remember? Is that all considered in psychotherapy as compensable?

A Psychiatrists usually do those things and, generally speaking, do not to [sic] bill the patients for those things, and it's included in the so-called therapy hour.

Q So that would be included, then.

Is that your answer?

A I don't understand your question.

Q All right. I'll try to restate it, then. All (p. 69) of those things that I just talked about on an outpatient basis, such as reviewing the charts, calling or checking medication dosages, calling perhaps other doctors or other health care providers or the hospital or the social worker, the housing area, prior to, after, or during psychotherapy session – would those be, under your knowledge of the rules and regulations of the DSSH Medicaid providers in this state – would that be compensable under the term "psychotherapy"?

A Our rules say that a therapist can see a patient for between forty-five to fifty minutes and be compensated for an hour. And in that hour's time, phone calls, review, charting would take place.

Q And then it would be compensable.

A Yes.

Q Now, is there anything in those rules that say that this must be done continuously?

A I don't know what you mean by "continuously."

Q Well, no break in the chain of events. In other words, may the doctor review all of his records in the morning and do all of that milieu – if I'm pronouncing it right, or milieu – and then see the patients all in the afternoon and still charge for the full fifty minutes?

A If the physician or the psychiatrist or the providers sees the patient for forty-five or fifty minutes, (p. 70) according to our rules, they're entitled to charge for an hour.

Q Well, let me state, then, that he sees, the doctor sees the patient in the afternoon for only thirty minutes.

A Then he should charge for only thirty minutes.

Q And he reviewed the records in the morning and did all of that stuff, and it took fifteen minutes per patient to do that in the morning. May he then properly charge and recover from your program one hour, fifty minutes of psychotherapy session?

A I've already answered the question.

Q What is your answer?

A I just said that if he sees the patient for thirty minutes, they bill for thirty minutes. If they see for forty-five or fifty-minutes, then they bill for an hour.

Q But you told me earlier that all of that was compensable, and I said – I disjointed it. I put the fifteen minutes reviewing charts and getting all ready to see the patient in one morning and then I did it in the afternoon, I saw the patient for thirty minutes. And you're telling me that, therefore, the doctor cannot recover the forty-five-minute psychotherapy session?

A Correct.

* * *

(P. 74) MR. GESHELL: Okay.

THE COURT: Objection overruled.

A According to our definition of our rules, psychotherapy is the contact with the patient, interaction with the patient. There is no interaction with the patient in this hypothetical example that he gave.

Q (By Mr. Geshell) And yet if the patient came in at 5:30 that day and saw the doctor for thirty minutes, you'd still say that that was not compensable?

A If the patient saw the physician or the psychiatrist for thirty minutes, that is a thirty-minute visit.

Q And then he couldn't add on the fifteen minutes that he spent at noon looking at the chart before the patient?

A Correct.

Q That's your interpretation?

A Yes.

Q And you think that that's not absurd?

A I do not think it's absurd.

MR. GESHELL: Very well. That's all.

THE COURT: Well, if we're going to be going any further, we'll come back at 1:30.

MR. GESHELL: Just one question, Judge.

Q (By Mr. Geshell) So then, what the bottom line (p. 75) on that hypothetical is, that if the physician had a scheduled forty-five minute session with the patient, you could sit there with the patient in the office and review the charts for fifteen minutes and then don't say a word to the patient and then talk with the patient for thirty minutes, and then you could then, the doctor could validly, in your interpretation, bill the Medicaid people for a forty-five-minute session.

A If he hasn't said anything to the patient for fifteen minutes, there is no interaction.

MR. GESHELL: That's enough.

Thank you.

MR. YEE: Nothing further, Your Honor.

THE COURT: Is that it on the rebuttal?

MR. GESHELL: It is, Your Honor.

THE COURT: Okay. We'll come back at 1:30 to put your motions on the record, and then we'll decide the further course of the trial, arguments.

MR. GESHELL: Fine.

(Recessed at 12:02 p.m.; reconvened at 1:35 p.m.)

THE COURT: Mr. Geshell, you have some motions?

MR. GESHELL: Yes, Your Honor.

The defendant renews the motion for judgment of

* * *

NO. 14443

IN THE SUPREME COURT
OF THE STATE OF HAWAII

CAROL A. BROWN, M.D., Plaintiff-Appellant, vs. DONALD WONG; CLYDE VIERRA; FRANKLIN Y. K. SUNN; EARL MOTOOKA; THE STATE OF HAWAII; DEPARTMENT OF HUMAN SERVICES, formerly the Department of Social Services and Housing of the State of Hawaii, Defendants-Appellees, and JOHN DOES 1 through 10; DOE CORPORATIONS 1 through 10; and DOE UNINCORPORATED ASSOCIATIONS, INCLUDING PARTNERSHIPS 1 through 10, Defendants.	CIVIL NO. 88-2370 APPEAL FROM THE ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, FILED MARCH 7, 1990 FIRST CIRCUIT COURT HONORABLE SIMEON ACOBA, JR. HONORABLE PHILIP T. CHUN HONORABLE RONALD MOON HONORABLE ROBERT G. KLEIN Judges (Filed July 20, 1990)

OPENING BRIEF OF PLAINTIFF-APPELLANT CAROL A. BROWN, M.D.

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CERTIFICATE OF SERVICE ATTACHED

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APPENDIX

CERTIFICATE OF SERVICE

* * *

subjecting her professional life to publicity, plus placing her in a false light in the public eye.

Count V (1R 13-14) alleged a tortious interference with contracts. This claim will not be pressed on this appeal, as the State is not liable for such under **HRS §662-15(4).**

Plaintiff also alleges in Count VI (1R14-15) a civil rights violation of **42 U.S.C. §1983** by invasion of her constitutional rights, in that the State violated her constitutional rights secured by the **United States Constitution** and laws and invaded the physician-patient privilege, violated the contract clause, (**Article I, Section 10** of the **United States Constitution** and the federal regulations concerning Medicaid). Plaintiff also seeks reasonable attorney's fees as provided in **42 U.S.C. §1988.**

Appellee's motion for summary judgment was granted concerning the foregoing claims on March 7, 1990 (6R 30-45) [See Appendix A]. That order was **HRCP Rule**

54(b) certified on April 4, 1990 (6R 108-109) [See Appendix B]. Dr. Brown then filed her Notice of Appeal on the same date in a timely fashion (6R 112-114).

III. STATEMENT OF POINTS OF ERROR

A. The trial court erred in concluding the Defendants were immune from tort liability under both common law torts and the civil rights statute.

(1) Paragraphs 12 and 18 of the March 7, 1990, order provide as follows:

> "12. In the instant case, the State officials sued in their personal or individual capacities have valid defenses, which exist as a matter of law, and which cannot be refuted on the record presented, based on the doctrines of qualified immunity or absolute derivative immunity, as applied to all claims arising under 42 U.S.C. § 1983, and under the Hawaiian common law. Counts I and IV allege common law torts against, *inter alia*, the State officials in their individual or personal capacities. Under *Bullen* and the cases cited therein, absolute derivative immunity is a defense to common law claims where there has been judicial intervention which breaks the chain of causation. Clearly, in this case, two judges intervened between the alleged wrongful acts of the officials and the trial of the plaintiff. All of the defects concerning the indictment and the search were presented in the pretrial motions. Nevertheless, the indictment was not dismissed, and the evidence was not suppressed. Per *Bullen*, the intervening acts of the judges shield the accused officials and warrant dismissal of the claims in Counts I, and IV. The same reasoning also warrants dismissal of

the § 1983 claims against the State officials in their individual or personal capacities." (6R 41-42)

"18. Because Counts I and IV cannot be maintained against the State officials in their individual or personal capacities on the basis of the absolute derivative immunity recognized by the *Bullen* decision and the cases cited therein, these Counts must also be dismissed against the State, DHS, and the officials sued in their official capacities. *Hulsman, supra;* H.R.S. § 662-2." (6R 44)

(2) Plaintiff argued against such conclusions in her memorandum opposing the motion (3R 24-33).

(3) These conclusions are erroneous with respect to ***BULLEN vs. DEREGO,*** 68 Haw. 587, 724 P.2nd 108, (1986), because it was reasonably foreseeable that the circuit judge would deny the various motions in the criminal case and require the case to proceed to trial; and, therefore, under ***COLLINS vs. GREENSTEIN,*** 61 Haw. 26, 595 P.2nd 275, (1979), such act does not constitute an intervening cause of the plaintiff's injuries. Moreover, the ***Bullen*** decision does not apply where false evidence was presented to the grand jury and where the prosecution withheld evidence from the grand jury, such as the fact that the various patients were not capable of accurately testifying about the time they spent with Dr. Brown in psychotherapy. Also, the grand jury was not presented with the evidence about the vague and ambiguous regulations or lack thereof which were attempts at regulating the provider's relationship with the State, DHS, and HMSA. This is not a malicious prosecution/ false arrest case.

B. The trial court erred in concluding Defendants were not negligent in administering the Medicaid Program, since the State owed no duty to the Plaintiff to properly administer the Medicaid Program.

(1) Paragraphs 13 and 17 of the March 7, 1990, order provide as follows:

> "13. No claims per Count III (negligent Administration of the Medicaid Program) are cognizable against the State officials sued in their individual or personal capacities (or in any other capacity or against the State or DHS) because no legal duty was owed by the State or its administrators to Plaintiff to properly administer the Medicaid program. Accordingly, for the reasons above, all claims pleaded against the State officials (defendant Wong, Vierrra [sic], Motooka, and Sunn) in their individual or personal capacities are dismissed with prejudice on the record herein." (6R 42)

> "17. No claims per Count III are cognizable against the State, DHS, or state officials in any capacity, since no legal duty was owed by the State or its administrators to Plaintiff to properly administer the Medicaid Program. Thus, Count III is dismissed not only against State officials sued in their individual or personal capacities, but also against the State, DHS, and the State officials sued in their official capacities." (6R 43)

(2) Plaintiff argued against such conclusions in her memorandum opposing the motion (3R 11-15).

(3) These conclusions are erroneous because, having voluntarily entered the program, the State must comply with the Federal regulations. *BERKOVITZ vs. UNITED STATES*, 486 U.S. 531,

100 L.Ed.2nd 531, 108 S.Ct. 1954, (1988); ***HARRIS vs. McRAE,*** 448 U.S. 297, 65 L.Ed.2nd. 784, 100 S.Ct. 2671, (1980). It must, likewise, comply with the federal regulations. ***SILVER vs. BAGGIANO,*** 804 F.2nd 1211, (11th Cir., 1986). The State is liable for the negligence of its employees in failing to perform their duty as required by the rules. ***UPCHURCH VS. STATE,*** 51 Haw. 150, 454 P.2nd 112, (1969). The provider also has a property right subject to due process requirements. ***OKOLI vs. NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,*** 532 N.Y.S.2nd 701, (Sup., 1988). If the State owes a duty to the dog owner as per ***CAMPBELL vs. ANIMAL QUARANTINE STATION,*** 63 Haw. 557, 632 P.2nd 1066, (1981), the State owes the health care providers a duty to comply with their own and the federal Medicaid regulations.

C. The trial court erred in concluding the individual Defendants are not liable under the civil rights statute.

(1) Paragraph 14 of the March 7, 1990, order provides as follows:

> "14. Claims purporting to arise under 42 U.S.C. § 1983 may not be maintained against the State, its departments, or its officials who are sued in their official capacities. *See Will v. Michigan,* 109 S. Ct. 2304 (1989); *Makanui v. Department of Education, supra,* 6 Haw. at 406, 721 P.2d at 171 (citing *Quern v. Jordan,* 440 U.S. 332, 341 (1979). All claims arising under 42 U.S.C. § 1983 against the State, DHS, or Defendants Wong, Vierra, Motooka, or Sunn, are barred by sovereign immunity, and therefore are subject to dismissal pursuant to Haw. R. Civ. P. 12(b)(1) or, alternatively, for failure to state a claim. *Id.* at (b)(6). (6R 42)

(2) Plaintiff argued against such conclusions in her memorandum opposing the motion for summary judgment (3R 24-28).

(3) These conclusions are erroneous because the opinion in ***WILL vs. MICHIGAN,*** 491 U.S. ___, 105 L.Ed.2nd 45, 109 S.Ct. 2304, (1989), only held that the State and its officials acting in their official capacity are not persons under **42 U.S.C. §1983.** Here, the other individual defendants were sued individually and, therefore, are still subject to liability for civil rights violations for their unconstitutional actions. ***ROBINSON vs. ARIYOSHI,*** 65 Haw. 641, 658 P.2nd 287, (1982). This is so because when the state official violates a federal law, he loses his official capacity and is subject to personal liability for his individual conduct. ***DEMERY vs. KUPPERMAN,*** 735 F.2nd 1139, (9th Cir., 1984), Cert. den., 469 U.S. 1127, 105 S.Ct. 810.

D. The trial court erred in concluding that the other tort claims of negligent infliction of emotional distress and invasion of privacy, plus negligence must also be dismissed.

(1) The March 7, 1990, order provided in Paragraph 16 as follows:

> "16. Plaintiff's remaining tort claims are crafted to avoid a defense based upon the statutory exclusions set forth at Haw. Rev. Stat. § 662-15 (1985), since the allegations speak in terms of Negligent/Intentional Infliction of Emotional Distress (Count I), Negligent Administration of the Medicaid Program (Count III), and Violation of Privacy Rights (Count IV). In any case, however, the claims must be dismissed on the basis of other grounds." (6R 43)

(2) Plaintiff argued against such conclusions (3R 33-37).

(3) this conclusion is erroneous because the Court apparently viewed the infliction of emotional distress, negligence, and invasion of privacy claims as really a malicious prosecution claim couched in the elements of three other torts. This erroneous reasoning was encouraged by the State, since it was claiming an exemption under **HRS §662-15(4)** for a claim arising out of false arrest or malicious prosecution. If the legislature wanted to exclude claims for negligence, emotional distress, and invasion of privacy which have been recognized by the law of this state for several years, including ***CAMPBELL vs. ANIMAL QUARANTINE STATION,*** *supra;* ***UPCHURCH vs. STATE,*** *supra;* and ***COOTEY vs. SUN INVESTMENT, INC.,*** 68 Haw. 480, 718 P.2nd. 1086, (1986), it could have done so. See also ***FERGERSTROM vs. HAWAIIAN OCEAN VIEW ESTATES,*** 50 Haw. 374, 441 P.2nd 141, 1986), for invasion of privacy recognized as a tort in Hawaii.

E. The trial court erred in concluding that all tort claims against all Defendants should be dismissed.

(1) Paragraph 12 of the March 7, 1990, order provides as follows:

> "IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that all Counts against Defendants Wong, Vierra, Sunn, and Motooka, whether gainst [sic] said defendants in their official, or personal, or individual capacity, are dismissed on the record presented." (6R 44)

(2) Plaintiff argued against such conclusion in her memorandum opposing the motion (3R 14-37).

(3) These conclusions are erroneous as per all of the foregoing reasons cited in Paragraphs A through D of these Points of Error.

F. The trial court erred in failing to lift the discovery protective order before granting summary judgment.

(1) On June 1, 1989, the trial court stayed discovery for 60 days "from the date of entry of this order pending receipt of any motions plaintiff or defendants may file on the issue of sovereign immunity." (1R 324-325)

(2) On February 22, 1990, the trial court likewise entered a protective order directing that the numerous depositions not be taken in this case pending decision by the trial court on the motion for summary judgment. (6R 16-17).

(3) Plaintiff argued against such protective orders and that they must be lifted prior to hearing on the motion for summary judgment, citing ***MAKANUI vs. DEPARTMENT OF EDUCATION,*** 6 H.A. 347, 721 P.2nd 165, (1986). (3R 23)

(4) The action of the trial court in failing to lift the discovery protective order is contrary to the law of this state. ***MAKANUI vs. DEPARTMENT OF EDUCATION,*** *supra.* It also deprives the Plaintiff of due process and fundamental fairness, since she was prevented from obtaining the very evidence that could be used against the Defendants in demonstrating how the Defendants violated her constitutional, statutory, and contractual rights guaranteed by not only the **United States Constitution** but also the **Hawaii Constitution.** Moreover, this deprives her of due process under the due process clauses of the **Fourteenth Amendment** to the **United States constitution** and **Article I, Section 5** of the **Hawaii Constitution.**

IV. STANDARDS OF REVIEW

1. The Court must accept the well-pleaded allegations of the Complaint and "the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which entitled him to relief". ***MARSLAND vs. PANG,*** 5 H.A. 463, 701 P.2nd 175, (1985).

2. In reviewing the trial court's ruling on a motion for summary judgment, the record is viewed in the light most

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them in a reasonably safe condition. ***PICKERING vs. STATE,*** 57 Haw. 405, 557 P.2nd 125, (1976). The State also has a duty toward prisoners to protect them against unreasonable risk of physical harm and is subject to liability for negligence in failing to so act. ***HAWORTH vs. STATE,*** 60 Haw. 557, 592 P.2nd 820, (1979).

Clearly, the trial court was in error holding that the State has no duty to the providers in administering the Medicaid Program. The State must tell the providers what the rules are and abide by the federal and state regulations. If the provider must abide by the rules, so must the State. The duty is self evident. Here, the State did not even tell the provider what the proper rules were, so how could the Plaintiff be criminally liable? Again, the same argument can be made with respect to a speeding case or a stop sign case where the State fails to adopt the speed limit law or locate a stop sign regulating traffic. The motorist cannot be criminally liable for violating a law that doesn't exist.

C. THE INDIVIDUAL DEFENDANTS ARE LIABLE UNDER THE CIVIL RIGHTS ACT.

According to ***WILDER vs. TANOUYE,*** *supra,* the prison officials are subject to civil rights damage liability under **42 U.S.C. §1983,** and where genuine issues of material fact exist, summary judgment is precluded. Here, the Plaintiff has alleged numerous violations of her civil rights guaranteed by the **United States Constitution** and the Medicaid regulations adopted pursuant to federal statutes. It was was [sic] clearly erroneous for the trial court to conclude otherwise on a motion for summary judgment. Deliberate indifference to the plaintiff's rights subjects the individual defendants to civil rights liability. ***ESTELL vs. GAMBLE,*** 42 U.S. 97, 50 L.Ed.2nd 251, 97 S.Ct. 285, Reh. den., 429 U.S. 1066, 50 L.Ed.2nd 785, 97 S.Ct. 798. See also ***MAKANUI vs. DEPARTMENT OF EDUCATION,*** 6 H.A. 397, 721 P.2nd 165, (1986), in which state officials sued in their personal or individual capacity may be liable for constitutional rights violations.

The recent U.S. Supreme Court opinion, ***WILL vs. MICHIGAN DEPARTMENT OF STATE POLICE,*** *supra,* holds that a state and an official of the state acting in his or her official capacity are not persons under **42 U.S.C. §1983.** This five-to-four decision is soundly criticized in the dissent and is, in the context of this case, contrary to ***MAINE vs. THIBOUTOT,*** 448 U.S. 1, 65 L.Ed.2nd 555, 100 S.Ct. 2502, (1980), which held that a state acting under color of state law shall be liable to the injured welfare recipients for damages and attorney's fees under **42 U.S.C. §§1983** and **1988** for alleged purely statutory violations of federal law under the aid-to-families provisions of the Social Security Act, **42 U.S.C. §601,** *et seq. SINGLETON vs.*

WULFF, 428 U.S. 106, 49 L.Ed.2nd 828, 96 S.Ct. 2868, (1976), holds that physicians have standing to assert in federal court a state's violation of the Medicaid provisions, excluding abortions that are not medically indicated for needy persons.

The U. S. Supreme Court, in ***JETT vs. DALLAS INDEPENDENT SCHOOL DISTRICT,*** 105 L.Ed.2nd 598, 109 S.Ct. 2702, (June 22, 1989), held one week after the *Will* opinion:

> "We hold that the express 'action at law' provided by §1983 for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' provides the exclusive federal damages remedy for the violation of the rights guaranteed by §1981 when the claim is pressed against a state actor. Thus to prevail on his claim for damages against the school district, petitioner must show that the violation of his 'right to make contracts' protected by §1981 was caused by a custom or policy within the meaning of *Monell* and subsequent cases."

With this backdrop, it is clear in Hawaii that sovereign immunity is no defense by a state official in the executive department when their action is attacked as being unconstitutional. ***ROBINSON vs. ARIYOSHI,*** 65 Haw. 641, 658 P.2nd 287, (1982). When a state official violates federal law, he is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct". ***DEMERY vs. KUPPERMAN,*** 735 F.2nd 1139, (9th Cir., 1984), citing ***SCHEUER vs. RHODES,*** 416 U.S. 232, 237, 94 S.Ct. 1683, 1687, 40 L.Ed.2nd 90, (1974). Another Ninth Circuit opinion, ***KEAUKAHA-PANAEWA COMMUNITY vs. HAWAIIAN HOMES,*** 739 F.2nd 1467, (9th Cir., 1984), holds that the

Hawaiian Admission Act of 1921 creates federal rights enforceable under a §1983 action regardless of whether any such private action is defined in the Admission Act. In so holding, the Court said, at Page 1470:

> "In conducting this inquiry, we must keep in mind that there is a presumption that a federal statute creating enforceable rights may be enforced in a §1983 action."

Clearly, under the Medicaid Act, **42 U.S.C. §1396, *et seq.*,** providers may have a right of action for violation of their rights and, therefore, may seek injunctive relief under **42 U.S.C. §1983. *VIRGINIA HOSPITAL ASSOCIATION vs. BALILES,*** 868 F.2nd 653, (4th Cir., 1989). The Ninth Circuit agrees in ***COOS BAY CARE CENTER vs. STATE OF OREGON DEPARTMENT OF HUMAN RESOURCES,*** 803 F.2nd 1060, (9th Cir., 1986), Vacated to consider mootness, 108 S.Ct. 52, which held that the Plaintiff, a health care provider under Medicaid, **42 U.S.C. §§1396-1396q,** stated a claim cognizable under **42 U.S.C. §1983** against the State where plaintiffs allege that the action or non-action of the State violate the standards set forth in the Medicaid Act.

See also ***FUJIWARA vs. CLARK,*** 703 F.2nd 357, (9th Cir., 1983), in which the Court held two officers of the Hawaii DOE did not enjoy qualified immunity from liability in connection with their discharging a plaintiff employee and, therefore, the defendants were liable under **42 U.S.C. §1983** for damages for deprivation of free speech.

Where government investigators conspire with another to violate the plaintiff's civil rights, "no court has yet held

that absolute immunity from prosecution for false testimony extends to conspiracy with public officials to present false testimony". *SAN FILIPO vs. U.S. TRUST COMPANY OF NEW YORK,* 737 F.2nd 246, (1984). Here, Plaintiff alleged a conspiracy between Mr. Canlas and Defendants Wong and Vierra to violate the Plaintiff's **6th Amendment** right to trial and counsel and to deny her equal protection of the laws, all in violation of **42 U.S.C. §1985(2).**

D. THE TORTS OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, INVASION OF PRIVACY, AND NEGLIGENCE ARE NOT EXCLUDED UNDER HRS §662-15(4).

The trial court concluded that the claims of negligent or intentional infliction of emotional distress in Count I, negligent administration of the Medicaid Program in Count III, and invasion of privacy, Count IV, should be dismissed because they are really excluded under **HRS §662-15.** Plaintiff argues that the case law of Hawaii recognizes these independent torts of emotional distress, invasion of privacy, and negligence, all of which have different elements than a malicious prosecution or false imprisonment claim. These torts coexist out of the same operative facts, but that is still no reason for dismissing the suit. If the Plaintiff pleads and proves elements of the torts of emotional distress, invasion of privacy, and negligence against the Defendants, then under recognized theories of tort liability in Hawaii, the Defendants may be liable. Clearly, under *CAMPBELL vs. ANIMAL QUARANTINE STATION, supra,* the State may be liable for negligently inflicting emotional distress as a result of a

property damage claim for the death of a dog. Certainly then Plaintiff should be entitled to recover emotional distress damages for injury to her medical practice and her emotional condition as a result of all the illegal acts of the State in connection with her life for several years. This would likewise constitute an invasion of privacy which is recognized in ***FERGERSTROM vs. HAWAIIAN OCEAN VIEW ESTATES***, 50 Haw. 374, 441 P.2nd 141, (1968). Certainly the publicity occasioned by the prosecution of Plaintiff entitles her to her day in court with respect to the invasion of privacy claim because of the intrusion into her life and placing her in false light in the public eye. ***TUREEN vs. EQUIFAX, INC.***, 571 F.2nd 411, (8th Cir., 1978). ***RODRIGUES vs. STATE***, 52 Haw. 156, 472 P.2d 509, (1970), also supports the conclusion that the State may be liable for negligent infliction of emotional distress where it breaches its duty of care, all of which is alleged in the case at bar. With respect to the negligence claim, that is previously argued hereinabove in Part B as per ***UPCHURCH vs. STATE, supra***, for negligence in the performance of the State's duties as being actionable under **HRS §662-2, *et seq***. Such liability is not within the exceptions contained in **HRS §662-15.**

It is, therefore, submitted that Judge Klein disregarded the case law of Hawaii, which violates not only the due process and equal protection clauses of the **Fourteenth Amendment**, plus *stare decisis*.

E. FAILURE TO LIFT THE DISCOVERY PROTECTIVE ORDERS BEFORE GRANTING SUMMARY JUDGMENT VIOLATED DUE PROCESS.

Contrary to *MAKANUI vs. DEPARTMENT OF EDUCATION*, 6 H.A. 397, 721 P.2nd 165, (1986), the trial court granted summary judgment for the Defendants when it had restricted the Plaintiff's discovery and prevented her from deposing a number of witnesses and obtaining further production of documents (6R 16-17 & 1R 324-325). This judicial decision deprives the Plaintiff of her due process and equal protection rights guaranteed by the **Fourteenth Amendment** to the **United States Constitution** and **Article I, Section 5** of the **Hawaii Constitution**. It also impairs the obligation of contract in violation of **Article I, Section 10** of the **United States Constitution**.

VII. CONCLUSION

For each and all of the foregoing reasons, it is respectfully submitted that the trial court erred in dismissing the several tort claims alleged in this case. Plaintiff has established sufficient grounds for each of the torts alleged sufficiently at this time to survive the motion for summary judgment. Moreover, the Court precluded her from further discovery to obtain additional evidence to help prove her case and at least offer additional evidence to the trial court to survive the motion for summary judgment. Accordingly, this Court should reverse and remand with directions to deny the motion for summary judgment on the various torts alleged and permit the Plaintiff to continue her discovery and that the matter proceed to trial on the merits, with costs taxed against Appellee.

DATED: Honolulu, Hawaii, this 19 day of July, 1990.

Respectfully submitted,

/s/ R. Steven Geshell
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